Supreme Court, U.S.
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No._____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

CYNTHIA WILLIAMS, LORENZO HARRIS,SHELLY HILL, HALLIE CLOUD,FRELANDER YARBROUGH, JR., DONALD JACKSON,CLYDE WARNER, DWJANA LAWSON,JACK MARTIN,HUEY CUNNINGHAM,JULIUS J. LARRY, III,and JUSTICE CENTER - HOUSTON,
Petitioners,

v.

PHILLIPS PETROLEUM COMPANY, W. WAYNE ALLEN and PETE SILAS,
Respondents.

On Writ Of Certiorari To The United States Court of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

BENTON MUSSLEWHITE
1250 Lyric Centre
440 Louisiana
Houston, Texas 77002
(713)222-2288
(713) 222-0394 (FAX)

Attorney for Petitioners

Of Counsel:

JULIUS J. LARRY, III
River Oaks Tower
3730 Kirby Drive, Suite 1180
Houston, Texas 77098
(713) 942-0320
(713) 942-0401 (fax)

Alpha Law Brief Company • Houston, Texas • (713) 981-9000 • 1-800-981-9001

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QUESTIONS PRESENTED FOR REVIEW

1. The Petitioners ("Employees") were employed by the Respondent, Phillips Petroleum Company ("Phillips") until Phillips had a lay-off of more than 1,000 Employees, which commenced March 2, 1992. The Employees filed a class action declaratory judgment suit alleging failure to provide proper notice under the Worker Adjustment and Retraining Notification Act ("WARN"). Phillips argued that the Employees should have returned their severance pay prior to filing the WARN Act lawsuit because they "signed releases in exchange for enhanced severance benefits." Is there a requirement under the WARN Act, or Age Discrimination in Employment Act ("ADEA") or Title VII that the Employee who signed a release must tender the consideration to the Employer, prior to filing suit?

2. The Petitioners filed the WARN Act declaratory judgment suit on December 21, 1992 - nine (9) months after the commencement of the lay-off of March 2, 1992. Phillips asserted that the suit was barred by the statute of limitations because the National Labor Relation Act's six-month statute of limitations applied to WARN. Does the state contract statute of limitations apply to WARN rather than the NLRA's six-month statute of limitations?

3. The Petitioners, their counsel and counsel's former employer were sanctioned more than $94,323.50, including double costs on appeal and attorneys fees at the appellate and district court for filing a frivolous appeal and other "misconduct" involving issues of first impression, unsettled law, and counsel's interpretation of the district court's written courtroom procedures manual. Petitioners' counsel has paid the Circuit Court's mandate and tendered the full amount of attorneys fees and costs. Was Petitioners' appeal to the Fifth Circuit "frivolous", as a matter of law, thereby warranting death penalty sanctions?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings are: Cynthia Williams, Lorenzo Harris, Shelly Hill, Hallie Cloud, Frelander Yarbrough, Jr., Donald Jackson, Clyde Warner, Dwjana Lawson, Jackie Martin, Huey Cunningham, Julius J. Larry, III, and JUSTICE CENTER-Houston- Petitioners.

Phillips Petroleum Company, W. Wayne Allen, and Pete Silas are the Respondents.

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On Writ Of Certiorari To The Fifth Circuit Court of Appeals

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PETITION FOR WRIT OF CERTIORARI

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To The Honorable Chief Justice of the United States Supreme Court and the Associate Justices of the Supreme Court:

Cynthia Williams, et.al., the Petitioners, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit that was rendered on June 24, 1994.

OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS DELIVERED BY THE COURTS BELOW

The opinion of the Fifth Circuit Court of Appeals (Jerry E. Smith, Circuit Judge) is reported at 23 F.3d 930 (5th Cir. 1994) and is reproduced in Appendix A. The Opinions of the United States District Court for the Southern

District of Texas, Houston Division (Melinda Harmon, Judge) is unreported and is reproduced in Appendix B.

GROUNDS UPON WHICH THE JURISDICTION OF THE SUPREME COURT IS INVOKED

The final judgment of the Court of Appeals sought to be reviewed was entered on June 24, 1994. Appellants below were discouraged from filing a petition for rehearing or suggestion of rehearing in en banc by Circuit Judge Jerry Smith, under penalty of "further sanctions and/or discipline".

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254 (1). This Petition for Writ of Certiorari is filed within 90 days of the entry of judgment by the Court of Appeals.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED IN THIS CASE

This case involves the construction and interpretation of the Worker Adjustment and Retraining Notification Act's ("WARN") statute of limitations. The statute does not set out a statute of limitations. 29 U.S.C.A. §2101 et sequitur.

The Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621, et sequitur, is involved regarding whether the releases signed by the Petitioners had to comply with the stringent requirements of the Older Workers Benefit Protection Act ("OWBPA") and whether the employees ratified the releases by not tendering back their severance pay prior to filing suit under WARN, the ADEA and Title VII.

The full text of 29 U.S.C.A. §2101 et sequitur is contained in Appendix D.

STATEMENT OF THE CASE

Cynthia Williams and the other similarly situated Employees brought a declaratory judgment suit against their former employer pursuant to the Worker Adjustment and Retraining Notification Act ("WARN"). On March 2, 1992, Phillips commenced a lay-off of over 1,000 employees from its Bartlesville, Oklahoma headquarters. Phillips' Bartlesville, Oklahoma headquarters encompassed (6) six buildings next to one another, plus one building 1½ miles away. The employees filed a class action suit because Phillips did not give them 60 days written notice prior to March 2, 1992, when the lay-off commenced.

All of the Petitioners signed releases that were presented by Phillips in exchange for severance pay and other benefits. At the time of the signing of the releases, the Petitioners were not aware or had any reason to believe that they had a cause of action or claim against Phillips, other than the plant explosion claims.

After receiving severance pay, Petitioners discovered that their jobs had not been eliminated as they had been led to believe by Phillips. Instead, younger employees and employees of other races, were placed in the Petitioners' former positions. Releases notwithstanding, Petitioners went to their local EEOC office and attempted to file charges of discrimination based on race, age, and the WARN Act. EEOC initially refused to process any charges against Phillips because releases had been signed.

Subsequently, the EEOC took the charges, but refused to investigate Phillips because the EEOC determined that "valid releases were in effect". The Petitioners did not tender back their severance pay prior to filing suit under

WARN, or ADEA or Title VII. The WARN Act suit was filed nine (9) months after Phillips commenced the March 2, 1992 lay off.

The Fifth Circuit ruled that the appeal, which contained issues of first impression and questions of unsettled law, was frivolous and assessed sanctions pursuant to Rule 38. FRAP. Petitioners' counsel paid the mandate to Phillips' counsel and tendered the full amount assessed in the district court and appellate court.

The district court's written courtroom procedures manual prohibits ex parte communications with court personnel by counsel. The district court's law clerk may contact counsel at the direction of the judge. There is no evidence in this case that the district judge instructed her law clerk to contact Phillips' counsel and discuss any matters in litigation.

A. Basis for Federal Jurisdiction in the District Court

The district court had jurisdiction of this case pursuant to 28 U.S.C. § 1331 and 29 U.S.C. § 2104 (a)(5).

REASONS FOR GRANTING PETITION FOR WRIT OF CERTIORARI

1 Certiorari Should Be Granted to Resolve Conflicts in Principle Among the Circuits and Lower Courts.

2. Certiorari Should Be Granted Because the United States Court of Appeals for the Fifth Circuit Has Decided An Important Question of Federal Law in Conflict With the Jurisprudence of the Supreme

Court. (Hogue v. Southern R.Co., 390 U.S. 516 (1968).

3. Certiorari Should Be Granted Because the Statute of Limitations Under the WARN Act Is in Need of Determination By the Supreme Court.

The "tender back/ratification" issue has produced numerous conflicts among the lower courts and the Circuits. There are a number of cases on appeal in the Fifth Circuit whose resolution involve the issue of whether the employees should have returned their severance pay and benefits prior to filing ADEA claims; Title VII claims and WARN Act claims.

The Seventh Circuit, in Oberg v. Allied Van Lines, Inc., 11 F.3d 679 (7th Cir. 1993), held that the employees had no duty to tender severance benefits back to their employer as a prerequisite to filing age discrimination claims, notwithstanding the employees' previously executed waiver of all claims. The Fifth Circuit held in Grillet v. Sears, 927 F.2d 217 (5th Cir. 1991); Wamsley v. Champlin Refining and Chemicals, Inc., 11 F.3d 534 (5th Cir. 1993; and Williams v. Phillips Petroleum Company, 23 F.3d 930 (5th Cir. 1994), that the employees ratified releases if they did not return their severance benefits prior to filing suit.

The Eleventh Circuit in Forbus v. Sears, Roebuck & Co., 958 F.2d 1036 (11th Cir. 1992), cert.denied, ___U.S. ___, 113 S. Ct. 412, 121 L. Ed. 2d 336 (1992), found that there was no ratification by the employees retaining the consideration they received from their employer, in an ADEA case. The courts in Oberg, Forbus and Isaacs v. Caterpillar, Inc., 7656 F. Supp. 1359 (C.D. Ill. 1991), relied

upon the Supreme Court's decision in Hogue v. Southern R. Co., 390 U.S. 516, 88 S. Ct. 1150, 20 L.Ed. 2d 73 (1968), which was a FELA case.

Hogue was a suit under the Federal Employers Liability Act brought by an injured railroad employee. The employee had signed a release in exchange for $105.00 Later he sued, alleging that the release was void for mutual mistake of fact. He did not tender the consideration he had been paid for the release. Georgia courts held that (1) Georgia law applied, and (2) under that law, failure to tender constituted ratification, requiring the suit to be dismissed.

The Supreme Court reversed both holdings. It held that "the question whether a tender back of the consideration was a prerequisite to the bringing of the suit is to be determined by federal rather than state law". 390 U.S. at 517, 88 S. Ct. at 1151. Then the Court held:

> It is sufficient for the purposes of this decision to note that a rule which required a refund as a prerequisite to institution of suit would be "wholly incongruous with the general policy of the Act to give railroad employees a right to recover just compensation for injuries negligently inflicted by their employers."Dice v. Akron, C & Y.R. Co., [342 U.S. 359], 362 [72 S. Ct. 312, 314, 96 L.Ed. 396]. Rather, it is more consistent with the objectives of the Act to hold, as we do, that it suffices that, except as the release may otherwise bar recovery, the sum paid shall be deducted from any award determined to be due to the injured employee. 390 U.S. at 518, 88 S.Ct. at 1152.

The Fourth Circuit, in O'Shea v. Commercial Credit Corporation., 930 F. 2d 358 (4th Cir. 1991), did not mention

the Hogue decision while finding ratification of a release because the employee did not tender back the severance benefits. The Fifth Circuit did not discuss the Hogue decision in Grillet. However, the Fifth Circuit attempted to distinguish Hogue in the Wamsley decision while criticizing the Seventh Circuit in Oberg and the Eleventh Circuit in Forbus, as having improperly analogize the FELA to the ADEA.

At present, the following cases are pending on appeal before the Fifth Circuit whose outcome depend upon this Court's grant of certiorari:

Norton, et al v. Houston Industries, Inc, No. 94-20358. This case consisted of class action suits that were consolidated. The consolidated case included claims under the ADEA, Title VII, and the WARN Act. Nine hundred and forty (940) class members signed releases of all claims. After learning of grounds to avoid the releases, the employees sent letters of revocation to their employer. Hearings were held by the company, wherein the company refused to allow the employees to revoke their acceptance of the severance offer. The employees filed suits under WARN, ADEA, and Title VII. They did not return their severance benefits prior to filing suit. The company argued that the employees ratified the releases, relying on the Fifth Circuit's decisions in Grillet and Wamsley.

(2) Yarbrough, et al v. Phillips Petroleum Company., No. 94-20583. This case was filed as a class action asserting claims of age and race discrimination under the ADEA, Title VII, and ERISA claims. The employees signed releases of all claims in exchange for enhanced severance benefits. After the employees discovered that age and race discrimination had occurred, they filed charges with

the EEOC. They filed suit without having returned their severance benefits. The district court relied upon the Fifth Circuit's decisions in Grillet, Wamsley and Williams v. Phillips Petroleum.

3. Fuentez, et al v. Houston Industries, Inc., No. 94-0963. This case was filed as a class action asserting claims under the WARN Act. The employees who signed releases in exchange for severance pay did not return their severance pay prior to filing the WARN Act suit. The case was consolidated into the Norton case for deciding the release issues. The company argued that the employees had ratified the releases by retaining the consideration. The company relied on the Fifth Circuit's decision in Grillet.

4. Williams v. Phillips Petroleum Company, No. 94-0963. This case was filed by an individual Plaintiff under Title VII after receiving a letter of right to sue from the EEOC. The Plaintiff signed a release in exchange for enhanced severance benefits. She did not return the severance benefits prior to filing suit. The company argued that the employee ratified the release by not returning the severance pay.

The Supreme Court should grant certiorari because there is a split between the circuits regarding the WARN Act's statute of limitations. The Second Circuit held in UPIU v. Specialty Paperboard, Inc., 999 F.2d 51 (2nd Cir. 1993), that the National Labor Relation Act's six-month statute of limitations did not apply to WARN. The Fifth Circuit did not address the WARN statute of limitations in the Williams v. Phillips Petroleum Company case, although the issue of first impression was raised. Subsequent to the Williams decision, the Fifth Circuit decided Halkias v.

General Dynamics Corp., 1994 U.S. App. LEXIS 22917, where it held that the NLRA's six-month limitations period should control WARN cases.

The Third Circuit ruled that the NLRA's six-month statute of limitations did not apply to WARN. See, USW v. Crown Cork & Seal Co., 1994 U.S. App. LEXIS 21132.

ARGUMENT

1. The Petitioners ("Employees") were employed by the Respondent, Phillips Petroleum Company ("Phillips") until Phillips had a lay-off of more than 1,000 Employees, which commenced March 2, 1992. The Employees filed a class action declaratory judgment suit alleging failure to provide proper notice under the Worker Adjustment and Retraining Notification Act ("WARN"). Phillips argued that the Employees should have returned their severance pay prior to filing the WARN Act lawsuit because they "signed releases in exchange for enhanced severance benefits." Is there a requirement under the Age Discrimination in Employment Act ("ADEA") or Title VII or WARN Act, that the Employee who signed a release must tender the consideration to the Employer, prior to filing suit?

There is no requirement under the WARN Act, the ADEA or Title VII that an employee who signed a release in exchange for severance benefits must first return the consideration to the employer prior to filing suit.

Phillips asserted that Grillet v. Sears Roebuck & Co., 972 F.2d 217 (5th Cir. 1991), controls tender back and ratification. However, the Court's attention is directed to binding authority from the United States Supreme Court. Petitioners rely on the Supreme Court decision in Hogue v.

Southern R. Co., 390 U.S. 516 (1968). The question of whether a tender-back of the consideration is a prerequisite to the bringing of a suit is to be determined by federal rather than state law. 390 U.S. at 517. The Court held that there was no tender-back requirement under the FELA and that the "sum paid shall be deducted from any award determined to be due to the injured employee". 390 U.S. at 519. This decision cannot be lightly abandoned, even though Phillips claimed below that "Plaintiffs cannot avoid the Fifth Circuit's opinion in Grillet v. Sears, Roebuck & Co., 927 F.2d 217 (5th Cir. 1991), enforcing the tender back - ratification rule in an employment discrimination case".

Hogue is a clear directive that the question of tender back of consideration is to be determined by federal law. It does not matter what Texas law says about tender back and ratification under ERISA, ADEA or WARN. Phillips has not cited one case from any jurisdiction where a tender back of severance pay was upheld in a WARN declaratory judgment suit.

Lower courts have applied Hogue to reject tender requirements in lawsuits under other federal remedial statutes. See, eg., Smith v. Pinell, 597 F.2d 994, 996 (5th Cir. 1979) (Jones Act); Wahsner v. American Motors Sales Corp., 597 F.Supp. 991, 998 (E.D. Pa. 1984) (Automobile Dealers' Day in Court Act); Taxin v. Food Fair Stores, Inc., 197 F.Supp. 827, 830-831 (E.D. Pa. 1961) (Sherman Antitrust Act). Moreover, courts interpreting Hogue have made clear that the particular ground on which a release is challenged makes no difference; there is no tender requirement, period. See, e.g., Mohr v. Pennsylvania R. Co., 409 F.2d 73, 75 (3d Cir. 1969).

Hogue and its progeny demolish Phillips' argument, and deprive Grillet and O'Shea (neither of which mentions

Hogue) of authoritative effect. Hogue teaches that whether a tender requirement exists is not to be decided by state contract law principles, as Phillips claimed. It is a federal question, and must be decided by considering whether such a requirement would be "incongruous with the general policy" of the statute in question.

Like the FELA in Hogue, or the other statutes interpreted by the above decisions, the ADEA is a remedial statute and WARN is a notification statute. Indeed, the FELA, the ADEA, and WARN are statutes to protect employees. A tender requirement is just as big a chill to the Petitioners in the WARN Act case asserting their rights as it is to FELA or Jones Act Plaintiffs. Thus, there is no apparent reason why the Hogue rule does not govern ADEA, WARN or Title VII lawsuits. Hogue should apply in this case.

Three considerations unique to the ADEA make an ironclad case for applying the rule of Hogue to that statute.

(a). **The prohibitive impact of a tender requirement. Hogue rests on the view that a tender requirement would deter meritorious challenges to a release in FELA lawsuits. The consideration paid for the release in Hogue was just $105, but even that was too high a price for the Supreme Court to tolerate as a condition of challenging a FELA release.**

A tender requirement will have just as crippling effect on ADEA challenges - particularly in the context of early retirement programs. Older people who are unexpectedly forced out of employment or forced into early retirement, like the Petitioners, are in the worse position of all. They

had not planned for the mass lay-off or early retirement. They were not ready for it when they were called in without warning and forced out of the company. They were in no position to put their severance pay aside as a nest egg for future "tenders". It is hard to think of a group of people that is likely to be hit harder by a tender requirement than older workers and minorities. The ADEA, WARN, and Title VII are the worst conceivable candidates for making an exception to the Hogue rule.

(b). Legislative history and the Older Workers Benefit Protection Act.

In considering whether Hogue applies to the ADEA, it is essential to consider Congress' extraordinary preoccupation with ADEA releases. Congress has shown a long-running hostility toward ADEA releases. In 1987, the EEOC prescribed a rule that would have allowed releases of ADEA claims under certain conditions even though they had not been supervised by a court or administrative agency. Congress instantly suspended the application of that rule, and continued to suspend it in later years' appropriations bills. See, e.g. 113 Cong. Rec. H12401, 12534 (December 21, 1987); 134 Cong. Rec. H8399 (September 27, 1988).

This issue was resolved when Congress passed the **Older Workers Benefit Protection Act**, which severely restricts the use of releases under the ADEA. The Act imposes a list of specific requirements in connection with obtaining ADEA releases - a list that reads the opposite of everything defendants did in obtaining Plaintiffs' signatures on the Releases at issue in this case. See, 29 U.S.C. § 626(f). This Congressional history is relevant to the tender issue for two reasons. First, Hogue instructs federal courts to consider whether a tender requirement would interfere with the remedial purposes of the statute. As discussed

above, a tender requirement will make it impossible for most employees to challenge ADEA releases. To put it bluntly, Congress does not want that result. Congress' views on this subject are entitled to respect as a Court considers the effect on the ADEA of a tender requirement.

Second, a tender requirement for challenging ADEA releases would, as a practical matter, wipe out the **Older Workers Benefit Protection Act**. No matter how egregiously releases might violate the requirements of the OWBPA, employees would be precluded from challenging them unless they somehow could come up with the money they were given when forced out of the company against their will.

(c) The impossibility of determining what amount of "consideration" should be tendered back.

Imposing a "tender" requirement for challenges to ADEA, WARN or Title VII releases would frequently create insolvable practical problems. Grillet and O'Shea assume that it is clear-cut as to the consideration paid for the releases. Under some statutes such as FELA, it is clear-cut. Under ADEA, it often is not, especially in early retirement programs and forced reductions-in-force. The purpose of such programs is to induce workers to retire early or accept severance offers and leave the company earlier than they otherwise would have done. Such programs are an economic bonanza to the company. To get it, the company offers money for leaving early. When the company had the Employees sign a release in connection with the severance programs, it is absolutely unclear how much of these benefits should be considered consideration for leaving the company early and how much should be considered consideration for

the release and how much of the consideration was specifically for the release of WARN Act claims or Title VII claims.

A tender requirement would therefore raise the obvious question: "How much of the benefits must I tender?" There is nothing to be said for a tender requirement that immediately creates a baffling dispute over how much must be tendered. There is no statute worse suited to a tender requirement than the ADEA or WARN or Title VII. Hogue therefore controls this issue.

Even if "ordinary contract principles" derived from state contract law controlled, there would be no tender requirement. Grillet and O'Shea purport to look to state contract doctrines for the appropriate rule on tender (which is clearly erroneous). Both decisions assume that it is a universally accepted rule of state contract law that a person who has signed a release must tender the consideration to the employer prior to suing to avoid the release. Both cases err badly in making this assumption. The truth, as one court put it, is that the cases are in "hopeless disagreement" on this issue. Taxin v. Food Fair Stores, Inc., 197 F.Supp. 827, 831 (E.D. Pa. 1961). An ALR annotation of state court cases on this issue runs over 175 pages. Annotation, "Tender as a Condition of Action -- Release", 134 A.L.R. 6.

Some states impose no tender requirement for lawsuits that challenge releases. Some states impose tender requirements for certain kinds of challenges to releases but not for others, becoming enmeshed and intertwined in the mysteries of "void" versus "voidable" contracts. Some states impose universal tender requirements. More than a few states simply cannot make up their minds from decision to decision.

Illinois illustrates the chaos typical of the states. Modern authority from Illinois suggests that Illinois has abandoned a tender requirement. Ruggles v. Selby, 25 Ill.App.2d 1, 165 N.E.2d 733, 743 (1st Dist. 1960). Ruggles held that no tender was necessary in a case seeking to void a release on the grounds of mutual mistake of law. Earlier cases dealing with releases that were attacked on grounds of fraud had reached various different conclusions that are almost impossible to reconcile. See, Star Accident Co. v. Sibley, 57 Ill.App. 315 (1985) **(declining to require a tender in cases involving fraud)**; Chicago Union Traction Co. v. Mommsen, 107 Ill.App. 353 (1903); Worthy v. Cleveland, C.C. & St. L.R. Co., 251 Ill.App. 585 (1929) (holding tenders sometimes required and sometimes not).

The confusion among state jurisdictions on this issue is reason enough for this Court to decide this issue, not on the basis of state-law contract doctrines, but as Hogue commands-on the simple basis of what rule best serves the purposes of the statute. But if this Court were to decide this issue by reference to state contract principles, it could not have a better authority to follow than the American Law Institute's Restatement of Contracts, § 384(1)(b), which contains a similar formulation.

This case fits section 480. As Taxin put it, citing section 480 to deny a tender requirement, "Should the Plaintiffs ultimately obtain a judgment against the defendants, the latter could be protected by our crediting the amount they paid for the release against the amount of the judgment". Id. Section 480 and the principles articulated are never mentioned by Grillet or O'Shea even though O'Shea explicitly claims to decide the tender issue by reference to "ordinary contract principles". Section 480 represents the best thinking on "ordinary contract principles" in this matter. It squares with common sense. It avoids a clash with the

purposes of the ADEA. It also echoes the conclusion that Hogue reached as a matter of federal law -- that "... the sum paid shall be deducted from any award determined to be due to the injured employee". 390 U.S. at 518. That language is plain, clear, and unambiguous. The "shall" language is mandatory.

(d) Even if a tender requirement existed, summary judgment should have been DENIED on grounds of "futility".

Even where the law requires a tender, such tender is excused if it would be futile. See, e.g., Needy v. Sparks, 74 Ill.App.3d 914, 393 N.E.2d 1252, 1255 (1st Dist. 1979); 74 Am.Jur.2d, Tender, §§ 4, 5. This general principle of the law of tender has been applied for years by jurisdictions that require a tender in connection with challenging releases. See, Provident Life & Acc. Ins. Co. v. Priest. 103 So. 678 (Ala. 1925); Sanford v. Royal Ins. Co., 40 P. 609 (Wash. 1895); Jones v. New York L. Ins. Co., 122 P. 702 (Okla. 1912); Westerfield v. New York L. Ins. Co., 107 P. 699 (Cal. 1910).

The "futility" exception would preclude summary judgment in this case even if there was a tender requirement for challenging the releases.

There is a genuine issue of material fact raised as to whether Phillips would have been willing to accept the tender in return for the rescission of the releases. The odds that Phillips would have accepted that tender are a million-to-one.

There is no tender requirement under WARN or ADEA. It would be unconscionable to force a tender under WARN and against public policy. Congress relies upon employees to report WARN violations. Certainly, employers cannot be expected to report WARN violations.

Phillips argued that it did not have a mass lay-off as defined by WARN. WARN requires that companies with one hundred employees or more provide their workers with a minimum of sixty-days' written notice **before** a plant closing or mass layoff. A "plant closing" is permanent or temporary shutdown of a single site of employment which results in an employment loss to a certain minimum number of employees. 29 U.S.C. § 2101(a)(2).

A "mass layoff" is a reduction in force that is not a result of a plant closing and which results in an employment loss to a certain minimum number of employees. 29 U.S.C. § 2101(a)(3). The term "employment loss" means (A) an employment termination, other than a discharge for cause, voluntary departure, or retirement, (B) a layoff exceeding 6 months, or (C) a reduction in hours of work of more than 50 percent during each month of any 6-month period...". 29 U.S.C. § 2101(a)(6).

While termination immediately qualifies as an employment loss, a layoff must last more than six months to qualify. It is undisputed that Phillips' March 1992 mass layoff was permanent, with no expectation of recall. An employer who fails to provide the statutory notice before such a layoff or plant closing is liable to those employees suffering an employment loss for back pay and lost benefits for each day of violation. 29 U.S.C. § 2104(a)(1).

When the facts of the case at bar are examined, reasonable minds could not differ on whether Phillips had a mass layoff. Phillips is an "employer" within the meaning of WARN. Phillips commenced a layoff on March 2, 1992. More than 500 workers were laid off, although all were not laid off on March 2, 1992. Where 500 or more employees, (excluding part-time employees) are affected, the 33% requirement does not apply, and notice is required. 20

C.F.R. § 639.6(c)(ii). Phillips did not give the affected employees 60 days' written notice prior to March 2, 1992, which is a violation of WARN.

2. The Petitioners filed the WARN Act declaratory judgment suit on December 21, 1992 - nine (9) months after the commencement of the lay-off of March 2, 1992. Phillips asserted that the suit was barred by the statute of limitations because the National Labor Relation Act's six-month statute of limitations applied to WARN. Does the state contract statute of limitations apply to WARN rather than the NLRA's six-month statute of limitations?

Congress failed to provide WARN with a statute of limitations. Therefore, the courts are left to decide an appropriate period. Phillips contended that the NLRA's six-month statute of limitations should apply to WARN. The Employees believe the state statute of limitations for contract causes of action should be applied to WARN.

The Supreme Court has developed an analytic framework for courts to use in the search for the proper statute of limitations. Although federal law determines which statute of limitations to apply, see UAW v. Hoosier Cardinal Corp., 383 U.S. 696, 16 L. Ed. 2d. 192, 86 S.Ct. 1107 (1966), the Court recently reiterated that when a federal statute contains no limitations period, courts should borrow or absorb the local time limitation most analogous to the case at hand. Lampf, Pleva, Lipkind, Paupis & Petigrow v. Gilbertson, 115 L.Ed.2d. 321, 111 S.Ct. 2773, 2778 (1991).

The Court will borrow federal rather than state limitations periods where (1) a federal rule ... clearly provides a closer analogy than state alternatives, and (2) the federal policies at stake and the practicalities of the litigation

render the federal limitation a significantly more appropriate vehicle for interstitial lawmaking. Phelan v. Local 305, 973 F.2d 1050, 1058 (2nd Cir. 1992), cert. denied, 122 L.Ed.2d. 785, 113 S.Ct. 1415 (1993) (quoting Del Castello v. Brotherhood of Teamsters, 462 U.S. 151, 172, 76 L.Ed.2d 476, 103 S.Ct. 2281 (1983).

A WARN cause of action does not fit the limited circumstance under which a federal statute of limitations should be applied. Courts are only to apply a federal statute of limitations if the federal statute is clearly more analogous and the state period would undermine federal policy. Congress has characterized a WARN claim as a private civil action which should not be interpreted as altering federal labor policy. See, 29 U.S.C. § 2105.

Section 10(b) of the NLRA gives an aggrieved person six months to file a charge with the National Labor Relations Board alleging unfair labor practices. Unlike WARN, the NLRA is a statute enacted to protect the right of workers to join together in labor organizations and collectively bargain for the terms and conditions of employment. The purpose of WARN, unlike that of the NLRA, is not to ensure labor peace but to alleviate the distress associated with job loss for both the workers and the community in which they live. The NLRA does not protect community interest in avoiding job loss. WARN has only a tangential effect on collective bargaining. WARN neither encourages nor discourages collective bargaining, thus differing in purpose from the NLRA. See, UPIU v. Specialty Paperboard, Inc., 999 F.2d 51 (2nd Cir. 1993), 1993 U.S. App. LEXIS 18608.

The Texas state statute of limitations for contract actions should be applied to WARN. Section 16.004 of the Texas Civil Practice & Remedies Code sets out a four-year

statute of limitations for contract causes of action. The personal injury statute of limitations in Texas is two years. § 16.003, Texas Civil Practice & Remedies Code.

3. The Petitioners, their counsel and counsel's former employer were sanctioned more than $94,323.50, including double costs on appeal and attorneys fees at the appellate and district court for filing a frivolous appeal and other "misconduct" involving issues of first impression, unsettled law, and counsel's interpretation of the district court's written courtroom procedures manual. Petitioners' counsel has paid the Circuit Court's mandate and tendered the full amount of attorney fees and costs. Was Petitioners' appeal to the Fifth Circuit "frivolous", as a matter of law, thereby warranting death penalty sanctions?

Petitioners, their counsel and JUSTICE CENTER - Houston, a non-profit legal services organization, were sanctioned pursuant to Rule 38, FRAP, for filing a frivolous appeal, along with "misconduct" of counsel. A frivolous appeal is an appeal in which the result is obvious or the arguments of error are wholly without merit. Coghlan v. Stanley, 852 F. 2d 806 (5th Cir. 1988). The Fifth Circuit in Coghlan also held that sanctions are merited for a frivolous appeal the result of which is obvious from the comprehensive and decisive exposition of the law by the judge below. That is not the case here. The district court's opinion is not comprehensive or dispositive of the issues raised..

At oral argument, Circuit Judge Jerry Smith made an unwarranted, abusive, personal attack on Petitioners' counsel. Subsequently, Judge Smith wrote a scandalous, misleading, inaccurate opinion, wherein he outright lied on Petitioners' counsel, while slanting the facts and omitting key facts and issues.

At the time Petitioners filed the WARN Act lawsuit, the WARN Act was not clear as to the definition of "single site of employment" or the WARN statute of limitations. The tender back/ratification issue is still not well settled today. The Fifth Circuit cited, Carpenters District Council v. Dillards Dept Stores, 15 F.3d 1275 (5th Cir. 1994). Petitioners' counsel should not be held to the high standard of being a prognosticator of future opinions. There was no way counsel could have known the Dillard Dept. Stores holding in 1992.

Furthermore, the WARN statute of limitations was an issue of first impression in the Fifth Circuit when the suit was filed. Although this issue was raised in the brief, the court did not address it. Sanctions are inappropriate if the issue is one of first impression. Ehm v. Amtrack Bd. of Directors, 780 F2d 516 (5th Cir. 1986).

Judge Smith, in an attempt to ruin Petitioners' counsel's career, deliberately omitted key facts and wrongly accused counsel of casting "brickbats" and attempting to "poison the well" by "tattling" on his opponent. However, Judge Smith failed to state in the scandalous opinion that the district judge had written courtroom procedures that prohibited contact with her court. The courtroom procedures stated the following, in pertinent part:

A. **COURT:** Counsel shall strictly abide by Local Rule 4 regarding communication with the Court.

B. **SECRETARY:** The Judge's secretary will not take telephone messages for counsel. Ex-parte contact by counsel through the secretary is forbidden.

C. **LAW CLERKS:** Counsel is not permitted to discuss cases or procedures with the Court's law clerks. At the Court's direction, law clerks may contact counsel; however, they will not discuss matters other than the subject of the call.

D. **CASE MANAGER:** The caseload will not allow the case manager to respond to telephone inquiries unless it is an emergency matter. Inquiries regarding motions, status of the case, etc., are not considered emergencies and should be addressed in writing to:

United States District Clerk
Post Office Box 61010
Houston, Texas 77028

Petitioners' counsel, as an officer of the court, had a duty to uphold the written courtroom procedures. While Judge Smith is concerned about the content of the conversations, counsel's purpose was to show that the communications took place and should not have, irrespective of what was discussed. Petitioners' counsel was not made a party to the conversations. Judge Smith deliberately misquoted the time sheet excerpts from counsel's brief, to support his contention that counsel was attempting to mislead the court.

After each entry, counsel cited to the full text in the record. However, the opinion omits the cites to the record. What is most egregious is that Judge Smith quoted virtually verbatim from the defense counsel's unsolicited, inflammatory letter dated April 4, 1994. The letter became part of the opinion.

As a result of Judge Smith's misconduct, counsel was sanctioned $20,000.00 attorney fees, cost and double appellate costs. However, Rule 38 does not mention sanctions of attorneys fees. The district court assessed $22,000.00 in attorneys fees, which has been appealed.

CONCLUSION

The judgment of the Court below should be reversed and rendered.

Respectfully submitted,

BENTON MUSSLEWHITE
1250 LYRIC CENTRE
440 LOUISIANA
HOUSTON, TEXAS 77002
(713)222-2288
(713) 222-0394 (FAX)

of Counsel:

JULIUS J. LARRY, III
River Oaks Tower
3738 Kirby Drive, St. 1180
HOUSTON, TEXAS 77098
(713) 942-0320
(713) 942-0401 (fax)

APPENDIX A

Cynitha Williams, Lorezo Harris, Shelly Hill, Hallie Cloud, Frelander Yarbough, Jr., Donald Jackson, Clyde Warner, Dwjana Lawson, Jackie Martin, and Huey Cunningham, Individually and on Behalf of All Others Similarly Situated, Plaintiffs-Appellants,

v.

PHILLIPS PETROLEUM COMPANY, W. Wayne Allen, and C.J. Pete Silas, Defendants-Appellees.

No. 93-2478

United States Court of Appeals, Fifth Circuit.

June 24, 1994

Laid off employees brought suit for employer's alleged violation of the Worker Adjustment and Retraining Notification Act (WARN) in allegedly failing to give statutorily required notice of layoff of covered employees. The United States District Court for the Southern District of Texas, Melinda Harmon, J., granted defendants motion for summary judgment, and plaintiffs appealed. The Court of Appeals, Jerry E. Smith, Circuit Judge, held that: (1) plants located in different states hundred of miles apart could not be considered a "a single site of employment" for purposes of WARN; (2) any obligation that employer had under WARN to give 60 days' advance notice of workers' discharge was satisfied when employer provided employees with fully paid excused leave; and (3) releases executed by workers precluded them from bringing claims under WARN.

Affirmed; appeal dismissed as frivolous.

1. Labor Relation

Whether multiple work locations constitute a "single site of employment," layoffs at which may be aggregated for purposes of determining employer's notice obligations under the Worker Adjustment and Retraining Notification Act (WARN), is mixed question of fact and law, which Court of Appeals determines de novo. Worker Adjustment and Retraining Notification Act, §§ 2-10, 29 U.S.C.A. §§2101-2109.

2. Labor Relations

Plants which were located in different states, hundreds of miles apart, could not be considered a "single site of employment" under the Worker Adjustment and Retraining Notification Act (WARN), where employees were not rotated between plants and plants did not share staff or equipment; accordingly, layoffs at the two plants could not be aggregated for purposes of determining employer's obligation under WARN to give employees advance notice of their layoff. Worker Adjustment and Retraining Notification Act, §§ 2-10, 29 U.S.C.A. §§2101-2109.

3. Labor Relations

Mass layoff at one employment site which is sufficient to trigger employer's notice obligation under the Worker Adjustment and Retraining Notification Act (WARN) would not necessarily give rise to a duty to warn employees at other plants who are bumped as a result of laid off workers' relocation, unless sufficient number of workers are bumped at second site to trigger WARN independently. Workers Adjustment and Retraining Notification Act. §§ 2-10, 29

U.S.C.A. §§2110-2109.

4. Labor Relations

Any duty that employee had under the Worker Adjustment and Retraining Notification Act (WARN) to provide workers with 60 days' advance notice of their layoff was satisfied where employer provided workers with fully paid excused leave during all or part of this 60-day notice period. Worker Adjustment and Retraining Notification Act. §§2-10, 29 U.S.C.A. §§2101-2109.

5. Release

Releases signed by workers in connection with their layoffs, pursuant to which workers, in return for payment of additional benefits, agreed to release employer from all claims relating to time of their employment or their layoffs, were valid and enforceable and precluded workers from bringing any claims for employer's alleged failure to give proper notice of their layoffs under the Workers Adjustment and Retraining Act (WARN); releases were written in clear, simple and easily understood English, workers had 45 days to consider releases prior to signing them, and workers were specifically advised,by language in releases, that they should seek legal advice. Workers Adjustment and Retraining Act, §§ 2-10, 29 U.S,C.A. §§2101-2109.

6. Federal Courts

Normally, release of federal claims is governed by federal law.

7. Release

Public policy favors voluntary settlement of claims

and enforcement of releases.

8. Release

Release of employment or employment discrimination claim is valid only if it is knowing and voluntary.

9. Release

Once party establishes that his opponent has signed release that addresses claims at issue, received adequate consideration and breached release, opponent has burden of demonstrating that release was invalid because of fraud, duress, material mistake, or some other defense.

10. Release

Court of Appeals examines totality of circumstances to determine whether releasor has established appropriate defense to claims for its alleged breach of release.

11. Release

Releases signed by laid off workers in connection with their layoffs did not have to specifically advise them of rights which they were relinquishing under the Worker Adjustment and Retraining Act (WARN), in order for releases to be enforceable and to preclude employees who executed releases from bringing claim under WARN for employer's alleged failure to give statutorily required notice of their layoffs. Workers Adjustment and Retraining Act, §§ 2101-2109.

12. Release

Burden was on laid off workers asserting claims under the Worker Adjustment and Retraining Act (WARN) to show

that releases executed by workers in connection with their layoffs were not enforceable, by producing some evidence of fraud, duress or other facts bearing on validity of releases.

13. Release

Even assuming that laid off workers did not knowingly and voluntarily sign documents purporting to relieve their employer of any claims under the Worker Adjustment and Retraining Act (WARN), they ratified release, and were precluded from bringing claim under WARN by failing to return consideration which they received in connection with their execution of release

14 Release

Even if release is tainted by misrepresentation or duress, it is ratified if releasor retains consideration after learning the release is voidable.

15 Release

Person who signs release, then sues his or her employer for matters covered under release, is obligated to return consideration.

16. Federal Civil Procedure

Denial of plaintiffs' motion for continuance to conduct additional discovery to support their opposition to defendants' motion for summary judgment was not abuse of discretion, where only issues presented by defendants' motion were pure issues of law, and no issues issues existed which would have required additional discovery. Fed. Rules Civ. Proc. Rule 56, 28 U.S.C.A

17. Federal Civil Procedure

District court properly denied plaintiffs' motion to join new parties, where plaintiffs identified no specific parties, that needed to be added by the time that trial court ruled on defendants's motion for summary judgment.

18. Federal Civil Procedure

Attorney fees of $20,000 were properly awarded against plaintiffs for their pursuit of frivolous appeal from district court's grant of summary judgement in favor of defendants on plaintiffs' claims under the Work Adjustment and Retraining Act (WARN), based on conduct of plaintiffs attorney in deliberately attempting to mislead Court of Appeals and to put veneer of impropriety on innocent acts of defendants by quoting selectively from defendant's time sheets and even mischaracterizing parties involved. F.R.A.P. Rule 38, 28 U.S.C.A.

19. Federal Civil Procedure

Cost and attorney fees are warranted for frivolous appeal, the result of which is obvious from comprehensive and decisive exposition of law by judge below. F.R.A.P. Rule 38, 28 U.S.C.A..

20. Federal Civil Procedure

Attorney fees imposed as sanction for party's frivolous appeal need not be fully compensable.

Appeal from the United States District Court for the Southern District of Texas.

Before **SMITH** and **BARSDALE**, Circuit Judges, AND **WALTER**, District Judge.

JERRY E. SMITH, Circuit Judge:

Plaintiffs appeal a summary judgment in favor of defendants on claims under the Worker Adjustment and Retraining Notification Act (WARN). Finding no error, we dismiss the appeal. Concluding that the appeal is frivolous and that plaintiffs' counsel's attacks on opposing counsel and

the district court are baseless and scurrilous, we award attorneys' fees and double costs under Fed.R.App.P. 38.

In 1992, Phillips Petroleum Company, Phillips Gas Holding Company, Inc. (PGHC), and Phillips 66 Company, a division of Phillips Petroleum Company, reduced their work forces at their Houston Chemical Complex ("HCC"). Phillips Petroleum Company laid off over 500 employees in Bartlesville, Oklahoma, and provided them with sixty days' advance written notice. The Company laid off many of those employees in May 1992, including Clyde Warner, Dwjana Lawson, Jackie Martin, and Huey Cunningham ("the Bartlesville plaintiffs").

HCC laid off twenty-seven employees who worked at three different locations in the Houston area and did not give any of them sixty-day written notices. HCC laid off five employees in December 1991, sixteen employees from March to July 1992, and six employees in September 1992. From March through June 1992, PGHC laid off forty employees who worked in three different single sites of employment. Thirty-one employees worked in Bartlesville, Oklahoma, eight in Houston, and one in Washington, D.C.

PGHC gave all the employees who worked in Bartlesville and four employees who worked in Houston sixty days' written notice of the layoff. The remaining laid-off PGHC employees did not receive sixty days' notice.

Five of the plaintiffs (collectively "Willams" or the "original plaintiffs") worked for HCC, which laid off Cynthia Willams and Shelly Hill in March 1992 and Donald Cloud, Frelander Yarbrough, Jr., and Donald Jackson in September 1992; the other named plaintiff, Lorenzo Harris, worked for PGHC in Houston. PGHC laid off Harris in March 1992. The defendants did not provide sixty-days' written notice to any of the original plaintiffs. No original plaintiff worked in Bartlesville, although the Bartlesville plaintiffs all worked in Bartlesville.

Phillips Petroleum Company laid off the Bartlesville plaintiffs in March 1992 and provided sixty-day written notices. The original and Bartlesville plaintiffs all signed releases after their terminations in exchange for enhanced layoff benefits.

B.

The original plaintiffs brought this action for alleged violations of WARN, 29 U.S.C. §§ 2101-2109, alleging that Phillips Petroleum Company and two of its officers, W.W. Allen, C.J. Silas (collectively "Phillips")[1] laid them off without providing the sixty-day written notice required by WARN.

On January 25, 1993, defendants requested summary judgement on the grounds that WARN was not implicated because the layoffs were not from a single site and that even if plaintiffs had signed written releases of their claims against Phillips. Plaintiffs filed a cross-motion for summary judgement, asking that the written releases be declared invalid.

On April 26, 1993, the original plaintiffs moved to join unnamed new parties to the lawsuit, stating that the new parties would be individuals who had been laid off from Phillips's operations in Bartlesville. The district court denied the motion.

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[1] Because we dismiss all defendants for failure to state a valid WARN claim, we need not address the issue of whether WARN permits liability to be imposed on individual defendants such as Allen and Silas. We note that individuals are excluded by WARN's plain terms, as WARN covers only an "employer." defined as a "business enterprise" that employees "100 or more employees," 29 U.S.C. §2101; *Wallace v. Detroit Coke Corp.* 818F.Supp. 192, 194 (E.D.Mich. 1993). Construing a similar definition of "employer" in title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e(b), we recently held that a natural person who does not qualify as an "employer" cannot be held liable for backpay. *see Grant v. Lone Star Co.*, 21 F.3d 649,653(5th Cir.1994).

The district court granted summary judgment to Phillips in an order and separate judgment entered on June 8, 1993. In that order, the district court identified several outstanding motions from both parties, rendered summary judgment for Phillips on all issues, and declared all other motions pending at that time to be moot.

On June 14, 1993, the plaintiffs attempted to have the Bartlesville plaintiffs join this action. In an order of July 26, 1993, the court denied all motions filed after the entry of final judgment. The court reserved ruling in its July 26 order on the defendants's bill of costs, which included a request for attorneys' fees, and has not ruled on the defendants' bill of cost at this time.

II

Plaintiffs stated in their notice of appeal that they were appealing "the final judgment entered in this action on the 8th day of June, 1993." In its June 8 order, the court rendered summary judgment on the original plaintiffs' claims against the defendants, denied the original plaintiffs' motion for summary judgment,and held that all other pending motions were moot. The court issued another order dated July 26, denying all motions filed after the June 8 order, including the original plaintiffs' attempt to join the Bartlesville plaintiffs. Because the plaintiffs appealed only the June 8 order, the only issues the plaintiffs perfected for appeal are the decisions made in that order. The motion to join the Bartlesville plaintiffs has not been preserved for appeal.

III

A.

[1] The district court rendered summary judgment because no mass layoff occurred at the single sites of employment

where the original plaintiffs worked. Whether multiple work locations constitute a "single site of employment" under WARN is a mixed question of fact and law. *Carpenters District Council v. Dillard Dep't Stores*, 15 F.3d 1275, 1289 (5th Cir.1994). Reviewing *de novo* the issue of whether the Houston and Bartlesville employment locations constitute a "single site of employment",we agree with the district court and hold that Houston and Bartlesville locations were not a single site of employment.

WARN requires covered employers to provide "affected employees" notice of a mass layoff. "Affected employees" include "employees who may reasonably be expected to experience an employment loss as a consequence of a proposed plant closing or a mass layoff by their employer." 29 U.S.C. § 2101(a)(5). A "mass layoff" is defined as any employment loss at a single site of employment which involves one-third of the employees at that site and at least 50 employees, or at least 500 employees. 29 U.S.C. § 2101(a)(3); 20 C.F.R. § 639.3(c). If a "mass layoff" occurs, the employer must provide written notice to each affected employee at least sixty days prior to the layoff and inform various state and local officials of the mass layoff. 29 U.S.C. § 2102. An employer who violates WARN is liable for back pay, lost benefits, civil penalties, and attorneys' fees. 29 U.S.C. § 2104.

1.

[2] The statute does not define a "single site of employment." The rules promulgated by the Secretary of Labor provided that "[n]on-contiguous sites in the same geographic area which do not share the same staff or operational purpose should not be considered a single site." 20 C.F.R. § 639,-3(1)(4). Groups of structures within a campus or industrial park, or separate facilities across the

street from one another, may be considered a single site of employment. Two plants on opposite sides of a town do not constitute a single site of employment if they employ different workers. *See* 20 C.F.R. § 639.3(i)(1), (4).

The Houston and Bartlesville layoffs can not be aggregated to bootstrap the Houston plaintiffs over the WARN minimum required for a mass layoff. The regulations indicate that two plants across town will rarely be considered a single site for purposes of a mass layoff. It is not plausible, under any reasonable or good-faith reading of the regulations, that the Houston and Bartlesville plants- located in different states and hundreds of miles apart- could be considered a "single site" for the purpose or WARN.

Employees were not rotated between the different sites, and the locations did not share staff and equipment. *See* 20 C.F.R. § 639.3(i)(3). No other "unusual circumstances" have been alleged that could support classifying the two plants as a "single site." *See* 20 C.F.R. § 639.3(i)(8); *Carpenters,* 15 F3d at 1290. As the Bartlesville and Houston sites are distinct, they may not be aggregated in order to meet the minimum employee requirements of WARN. 20 C.R.F. § 639.3(i)(1); *International Union, United Mine workers v. Jim Walkers Resources, Inc.* 6 F.3d 722, 724-27 (11 Cir. 1993). The Bartlesville layoffs, accordingly, are irrelevant to the issue of whether the Houston employees are entitled to notice under WARN.

No mass layoff occurred at the single sites of employment where the original plaintiffs worked. Five of the plaintiffs worked at HCC's operations in three different locations in and around Houston. HCC laid off twenty-seven employees over a ten-month period. One of the named plaintiffs worked for PGHC in Houston; PGHC laid off eight employees who worked at that site. The layoffs at HCC and PGHC were not mass layoffs as defined by the Act, as the number of employees laid off did not meet the fifty-

employees minimum. Thus, the Houston employees were not entitled to WARN notification.

2.

[3] Williams contends that the mass layoff in Bartlesville triggered the applicability of WARN, requiring that notice be given to those laid off in Houston. *See* Department of Labor Comments, 54 Fed.Reg. 16042,164046(1989). Even if we assume that these comments have legal effect, they apply only if employees at the single site suffering the mass layoff are relocated to other sites, thereby "bumping" employees at those sites. Moveover, those likely to be bumped must be individually and reasonably identifiable at least sixty-five days before the bumping occurs. *Id.*

A WARN event at the first site will trigger a WARN event at the second site only if a sufficient number of workers are bumped at the second site to trigger WARN independently. Plaintiffs have not alleged that any bumping occurred and have ignored the plain language of the department's comment limiting it to bumping situations.

3.

[4] Over 500 employees were laid off in Bartlesville.

williams contends that Phillips notice to those employees was defective. This claim fails for two reasons. First, the claims of the Bartlesville plaintiffs are not properly before us, as they failed to perfect their appeal. Second, even if we had jurisdiction, Phillips's alleged acts did not violate WARN.

There is no dispute in the record that Phillips provided sixty-day written notices to all employees laid off in Bartlesville. For some of the employees laid off, Phillips continued to pay their base pay and benefits during all or part of the sixty-day notice period but placed them on

"excused leave with pay." The employees were not terminated at this time. The notices submitted by Phillips stated that the layoff date was at least sixty days after the notice date. There is no evidence to support the assertion that Phillips immediately terminated the individuals laid off in Bartlesville.

Moveover, the premise of William's argument is of questionable validity. Excused leave with pay and benefits, with no corresponding duty to work, cannot harm an employee. WARN was intended to provide employees with notice so that they could adjust to the layoff and locate other work. Fully-paid excused leaves complies with these purposes.

B.

[5[The district court also rendered summary judgment for Phillips because the plaintiffs had signed releases covering the allegations made in their complaint. The plaintiffs filed a cross-motion for summary judgment contesting the validity of the releases. The district court properly granted Phillips's motion, thereby rejecting plaintiffs'.[2] [6-10] Normally the release of federal claims is governed by federal law. *See e.g. O'Hare v. Globel Natural Resources, Inc.*898 F.2d 1015, 1015, 1017 (5th Cir. 1990) (Age Discrimination in Employment Act ("ADEA"));*Rogers v. General Elect. Co.* 781 F.2d 452, 454 (5th Cir. 1986) (title VII of the Civil Rights Act of 1964). Public policy favors voluntary settlement of claims and enforcement of release of an employment or employment discrimination claim is valid only if it is "knowing" and "voluntary," *Alexander v. Gardner-Denver Co.* 415 U.S. 36, 52 n. 15,

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[2] Although this discussion is unnecessary to the issue our holding in part III,A,. *supra*, we include it as a further indication that this action is frivolous.

94 S.Ct. 1011, 1022 n. 15, 39 L.Ed.2d 147(1974). Once a party establishes that his opponent signed a release that addresses the claims at issue, received adequate consideration, and breached the release, the opponent has the burden of demonstrating that the release was invalid because of fraud, duress, material mistake, or some other defense. *O'Hare,* 898 F.2d at 1017.

1.

Each original plaintiff signed a release shortly after his or her termination of employment. The release was a condition to participation in the company's enhanced supplemental layoff pay plan, advised the employee to consult an attorney, gave ample time to consider the release, and specifically covered all claims relating to the individual's employment or layoff. The Bartlesville plaintiffs signed similar releases.

The requirements of WARN pertain to an individual's employment and termination, issues addressed in the releases. These benefits were in addition to the basic severance plan benefits that the employees would have received regardless of whether they had signed the releases. The original plaintiffs are making claims on matters addressed in their release, and the Bartlesville plaintiffs attempted to join the lawsuit that involved claims on matters addressed in their release. Thus, all elements of a valid release are present.

Williams has provided no credible evidence that the releases were obtained by fraud or duress. There is no genuine issue of material fact that the releases were valid.

[11] Williams contend that the releases were invalid because they did mention WARN. This argument is

meritless. There is no obligation under WARN or the common law for the defendants to mention WARN for the releases to be valid. The releases stated that they included all claims relating to the "time of my employment or to my layoff. . . " WARN applies to layoffs and the releases addressed all claims related to the plaintiffs' layoffs: thus the releases barred WARN claims. *See Fair v. International Flavors & Fragrances, Inc.* 905 F.2d 1114, 1117 (7th Cir.1990) (holding that a release of claims relating to employment barred claim under Employee Retirement and Income Security Act of 1974 ("ERISA");*Stoman v. West Coast Grocery Co.*,884 F.2d 458, 461 (9th Cir.1989), *cert denined,* 498 U.S. 854, 111 S.Ct. 151, 112 L.Ed2d 117 (1990); *Franz v. Iolab, Inc.* 801 F. Supp. 1537, 1543 (E.D.La.1992) (holding that a release of all claims barred wrongful discharge and ERISA claims).

Plaintiffs also argue that the waivers did not comply with the Older Workers Benefit Protection Act ("OWEPA"), 29 U.S.C. § 625(f). Plaintiffs have asserted no age discrimination claim, and their proffered analogy between WARN and the ADEA does not survive scrutiny. The OWBPA places specific requirements on waivers of age discrimination claims in order for them to be considered knowing and voluntary. This statute is a change from the common law, and there is no similar obligation imposed on employers under WARN.

[12] Williams contends that the waivers are invalid under a totality of the circumstances test. She claims that the combination of five factors makes the waivers invalid, but she identifies no precedent suggesting that these factors are dispositive. Williams carried the burden to demonstrate that there was a genuine issue of material fact on a defense of the validity of the releases. She was obligated to produce some evidence of fraud, duress, or other basis for holding the

release invalid. *See Widener v. Arco Oil & Gas Co.*, 717 F.Supp. 1211, 1215 (N.D.Tex.1989). She has not done so, thus summary judgment was appropriate.

Even if we accept William's statement of the totality of circumstances test, she cannot prevail. She identifies several elements to consider: (1) a plaintiff's education and business experience; (2) the role of each plaintiff and class member in deciding the terms of the release; (3) the clarity of the agreement and all related documents referred to in the releases; (4) whether each plaintiff and class member was represented by or consulted with an attorney; and (5) the amount of time each plaintiff and class member had possession of or access to the release before signing it.

Concerning the plaintiffs' education and business experience, there no evidence suggesting that they could not read or understand the releases. The cases relied upon by the plaintiffs are distinguishable by whether the individual who signed the release understood the claims released. There is nothing in the record establishing a genuine issue of material fact that the plaintiffs did not know what they were doing.

Plaintiffs argue that none of them negotiated the terms of the releases. There is no evidence that plaintiffs were denied an opportunity to negotiate, nor that they were given a "take or leave it" offer. The releases informed each employee that he should consult a lawyer and allowed a reasonable period, in most instances up to forty-five days, to consider the releases. The plaintiffs signed the releases and never asserted in their declarations that Phillips had precluded them from negotiating. There is no evidence sufficient to create a genuine issue of material fact.

The releases were clear, simple, and easily understood. The release precluded all claims related to the

plaintiffs' "employment" or "layoff." This is not technical jargon, and it covers the plaintiffs' WARN claims. The plaintiffs do not indicate what provisions could have been incomprehensible to them, as they were written in plain English. There is also no evidence of duress that could have forced them to sign involuntarily.

The plaintiffs also claim that the releases should be invalidated because the defendants presented no evidence that each plaintiff and class member actually consulted with an attorney. The releases signed by the plaintiffs stated:

> You should thoroughly review and understand the effect of the release before signing it. To the extent that you have any claims covered by this release, you will be waiving potentially valuable rights by signing. You are also advised to discuss this release with your lawyer.

Thus, the defendants advised the plaintiffs to consult a lawyer. Plaintiffs suggest that Phillips should have offered to supply a lawyer, but they offer no authority imposing this duty. Even without signing the releases, plaintiffs were entitled to substantial layoff benefits that could have been used to finance a lawyer, either individually or jointly. It is not Phillips' fault that the plaintiffs chose not to consult a lawyer after being advised to do so. Plaintiffs do not contest the final element of the test, as they were given as much as forty-five days to consider the releases.

2.

[13-15] Even if a release is tainted by misrepresentation or duress, it is ratified if the releasor retains the consideration after learning that the release is voidable. A person who signs a release, then sues his or her employer for matters covered under the release, is obligated to return the consideration. Offering to tender back the consideration after obtaining relief in the lawsuit would be

insufficient to avoid a finding of ratification. *Grillet v. Sears, Roebuck & Co.*, 927 F.2d 217, 220-21 (5th Cir.1991).

For signing the releases, the original plaintiffs as a group received $210,853.65 in consideration in an enhanced plan benefits and $56,632.38 in basic plan benefits. The original plaintiffs did not return the consideration to the defendants, even after making claims that the releases were voidable. Thus, the plaintiffs ratified the releases even if *arguendo*, they were not knowingly and voluntarily signed. *Grillet*, 927 F.2d at 220.

IV.

[14] Plaintiffs argue that the district court abused its discretion by not giving them time to conduct discovery and prepare affidavits to support their opposition to the defendants' motion for summary judgment. Plaintiffs complain that the court did not rule in their motion for continuance. This is incorrect. The court noted that the motion for continuance was outstanding and determined that all pending motions other the defendants' summary judgment motion were moot. As a result, the court denied the continuance.

Summary judgment was awarded because plaintiffs did not work at single sites of employment and had released their claims. These were pure issues of law. There are no issues of fact that would require additional discovery. Thus the court did not err by refusing to grant a continuance.

Plaintiffs also complain that Phillips did not answer discovery based upon the events in Bartlesville. Because all the plaintiffs worked in Houston, however, events in Bartlesville were irrelevant to their case. Thus, no further discovery was necessary.

Plaintiffs have asserted a number of other discovery requests. But they have not explained how these discovery matters are relevant to any issue in the case. Moreover, to the extant these discovery materials may be relevant, plaintiffs have not indicated what information they seek that would be sufficient to create a genuine issue of material fact. Denial of these requests was appropriate.

[17] Plaintiffs also assert that the district court abused its discretion by denying their to motion join new parties. The plaintiffs made this motion before the district court rendered summary judgment but did not identify the parties they sought to add until after judgment was entered. The court acted properly in denying the motion, as plaintiffs identified no specific parties that needed to be added by the time the court ruled on the motion. There was no basis for the district court to grant the motion without having specific parties to add.

V.

Plaintiffs' attorney, Julius J. Larry, III, contends that Phillips's outside attorney, Kerry E. Notestine, engaged in improper *ex parte* communications with the district judge, the magistrate judge, and their law clerks. The record is singularly devoid of evidence that the contacts were improper. Moreover, the same accusations were briefed and rejected in the district court. Lacking any evidence that the contacts were improper, the accusations of plaintiffs' counsel are scurrilous, frivolous,and contrary to the duties of an officer of the court. Larry's legal arguments are also frivolous and independently deserving of sanctions.

A.

[18] Larry seeks to mislead this court about the circumstances of the alleged improper contacts. He attempts to prove his conclusion of unethical conduct by Phillips's counsel by seriously misquoting defendants' counsel's time records, omitting important facts from the description of counsel's activities, and drawing unsupported conclusions. The defendants responded to these accusations in the district court. Serenely undeterred by his lack of success, Larry has renewed his personal attack against defendants' counsel in this court.

This issue arose from defendants' submission of a bill of costs in the district court. In their bill of costs, the defendants moved for attorneys' fees because the district court specifically found the plaintiffs' lawsuit was frivolous. The defendants attached billing records summarizing the activities performed by their counsel on the case. In their appeal brief, plaintiffs have excerpted section identifying five contacts between Notestine and the case managers to Judges Harmon and Stacy relating to scheduling matters and a discovery conference. The plaintiffs admit, as they must, that counsel may communicate with these individuals. Notestine also had one telephone conversation with Vivan Craft, Judge Stacy's law clerk, but that conversation initiated by Craft and was for a legitimate purpose.

Reviewing each of the allegedly improper contacts, Larry's duplicity in imputing unethical conduct to Notestine becomes apparent. For instance, in his brief on appeal, Larry reproduces the first contact as follows:

4/14/93	1.80 (Hours)	Telephone conference with clerk to Judge Harmon.

The record indicates that this excerpt should read;

4/14/93	1.80 (Hours)	Telephone conference clerk to Judge Harmon
with		status: telephone
re:		with Rob Fries re:
conference		preparation of
same:		response to sent
discovery		side; review of
to other		defendants
reply to		plaintiff's motion
response to		to supplement
for leave		complaint: transmitting
their		same to client.

Comparing Larry's excerpt with the accurate report, Larry plainly intended to mislead this court into believing that Notestine spoke for almost two hours with Judge Harmon's law clerk. The context of the full billing report, however, indicates that the phone conversation occupied only a small portion of the time. Moreover, because this entire issue was already briefed in the district court, Larry knew that Notestines's communication was actually with Judge Harmon's case manager, not any law clerk. Larry admits that contacts with a case manager are permissible. Despite recognizing that the time sheet should read "case manager" rather than "law clerk," he doggedly and irrelevantly continues to argue that law clerks should not communicate with parties.

Larry reproduces the second contact as follows:

5/3/93	.20 (Hours)	Telephone
conference with		clerk to
Judge Stacy.		

In full, the time sheet actually reads:

5/3/93	.20(Hours)	Telephone clerk
conference with Judge Stacy re: requested.		hearing

Again, Larry is aware that this contact was actually with Judge Stacy's case manager, not her law clerk. The substance of the conversation dealt with Judge Stacy's impending maternity leave and whether the parties would be able to have a discovery and motion conference before she went on leave.

The third contact is identified by Larry as follows:

5/14/93	.40(Hours)	Telephone conference Vivian Craft, law clerk
to		Judge Stacy.

The full text of the time sheet reads:

5/14/93	.40(Hours)	Telephone conference
with		Rob Fries re: status: telephone conference
with		Vivian Craft, law clerk
to		Judge Stacy, re:
discovery		conference.

Vivian Craft was Judge Stacy's law clerk.But this contact was initiated by her, not by Notestine, and the time recorded indicate the conversation related only to the discovery conference.

According to Larry, as set forth in his appellate brief, the fourth communication reads:

5/19/93	.60(Hours)	Telephone conference
with		Judge Harmon re: resolution on motions.

Again, reality differs dramatically from Larry's brief:

5/19/93	.60(Hours)	Telephone conversation with clerk to Judge Harmon re: resolution of motions: telephone conference with Rob Fries re: same.

Again, "clerk to Judge Harmon" refers to her case manager, not her law clerk, and there is nothing improper about contacting a case manager for this purpose.

Larry's characterization of the fifth contact is probably the most egregious misstatement of all:

4/28/93	1.30 (Hours)	Telephone conference with Judge Harmon.

In reality, the record reads as follows:

4/28/94	1.30 (Hours)	Telephone conference with Rob Fries re: rule 26(f) conference: research re: same: review of motion to add parties: transmitting same to client: telephone conference to Judge Harmon re: same: telephone conference with Rob Fries re: same.

Larry obviously hopes to mislead this court in a number of ways with his characterization of this time record. First, he implies that Notestine spoke directly with Judge Harmon for 1.3 hours. Defendants never spoke to Judge Harmon about the case and never attempted to do so, much less for a full 1.3 hours. As Phillips's counsel explained long ago, the reference to "telephone conference to Judge Harmon" was an abbreviated reference or typographical error relating to a conversation Judge Harmon's case manager, not the judge herself, about a rule 26(f) conference.

In advancing his claim, Larry has attempted to mislead the court by blatantly misrepresenting the record. Trying to sell this court on his conspiracy theories, he has attempted to put a veneer of impropriety on innocent contacts by quoting selectively from Notestine's time sheets and even mischaracterizing the parties involved. We will not stand by idly and allow an attorney to waste the time of this court and maliciously denigrate the reputations of judges and other officers of this court.

Moreover, Larry has not explained, either in his brief or in his ample opportunity at oral argument, why he has raised this issue at all. He has asked for no remedy, such as overturning the judgment. His only discernible motive is to cast brickbats and to "poison the well" by tattling on his opponent. Such motives hardly justify his baseless allegations and his attempt to lie to this court regarding what is in the record.

Upon determination that an appeal is frivolous, we "may award just damages and single or double costs to the appellee." FED.R.App.P.38. Larry has attempted to mislead this court for no legitimate end. He has wasted the time and energy of opposing counsel and of this court. As a result, we exercise our power to impose sanction on plaintiffs and their counsel for filing a frivolous appeal.

B.

Importantly, the plaintiffs' assertions, made through Larry, are not based upon any reasonable or good-faith reading of applicable law. They are utterly baseless an bizarre. The district court explained this in its comprehensive order granting summary judgment. At that point, any attorney should have advised his clients of the loss and urged them to pursue the matter no further.

Seven pages of Phillips's fifty-page brief were required to rebut Larry's misguided charges of misguided charges of misbehavior. The plaintiffs challenge to the validity of the waivers rests on a frivolous theory equating WARN with the OWBPA. Larry forced Phillips to defend against the claims of the Bartlesville plaintiffs, who were not even properly parties to this appeal. His argument for the applicability of WARN rests on comments by the Labor Department applicable only to employees bumped from their jobs by senior employees, a situation that is not alleged to apply here. Finally, although we have not reached the merits of the issue, his attempt to impose individual liability upon Sils and Allen lacks any colorable foundation in the language or structure of WARN.

C.

[19] "[C]ost and attorneys' fees [under rule 38] are merited for a frivolous appeal the result to which is obvious from the comprehensive and decisive exposition of the law by the judge below." *Coghlan v. Starkey,* 852 F.2d 806, 810 (5th Cir.1988) (per Curiam) (footnote Omitted.) In response to inquiry by the court, defendants' counsel documents $32,765,50 for attorneys' fees and $3, 039.22 in costs associated with responding to plaintiffs' appeal. Other than charges or in-house legal fees, these are fees actually billed to defendants by outside counsel.

[20] The plaintiffs have not disputed the reasonableness of these fees. We have held that fees imposed as a sanction need not be fully compensable. *See Atwood v. Union Carbide Corp.* 850 F. 2d 1093,1094 (5th Cir.1988) (per Curiam). We need not decide whether the fees claimed here are justified for we conclude that fees of $20,000 are supportable and will serve adequately as a sanction. For this

reason, we also need not decide whether the in-house legal fees of $5,607.00, included in the amount claimed, may be recovered.

D.

Given the generally frivolous nature of the appeal, exacerbated by Larry's scurrilous attacks on Phillips's counsel and the district court, pursuant to rule 38 we order the original plaintiffs, Larry, an Justice Center-Houston, which is of counsel on appeal, to pay Phillips's attorneys' fees of $20,000 and attorneys' costs of $3,039.22, plus double taxable cost on appeal. We also warn plaintiffs that further vexatious filings in this case, including any frivolous petition for rehearing or suggestion of rehearing or suggestion of rehearing *en banc*, will subject the plaintiffs and their counsel to further sanctions and/or discipline.

The appeal is DISMISSED as frivolous. *See* 5th Cir.R 422.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
ENTERED
JUN 08 1993
Michael N. Milby, Clerk
By Deputy: /s/ B. Jarma

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CYNTHIA WILLIAMS, ET AL.,	§	
Plaintiffs	§	
	§	
VS.	§	CIVIL ACTION NO.
	§	H-92-3909
PHILLIPS PETROLEUM	§	
COMPANY, ET AL.,	§	
Defendants	§	

FINAL SUMMARY JUDGMENT

Pursuant to the order signed on this day, the Court

ORDERS that final summary judgment is GRANTED in favor of Defendants Phillips Petroleum Company, W Wayne Allen, and C.J. Silas against Plaintiffs Cynthia Williams, Lorenzo Harris, Shelly Hill, Hallie Cloud, and Frelander Yarbrough, Jr. All costs are taxed against Plaintiffs.

THIS IS A FINAL JUDGMENT.

SIGNED at Houston, Texas, this 4th day of June,

1993.

/s/ Melinda Harmon
MELINDA HARMON
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
ENTERED
JUN 08 1993
Michael N. Milby, Clerk
By Deputy: /s/ B. Jarmon

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CYNTHIA WILLIAMS, ET AL., Plaintiffs	§	
VS.	§	CIVIL ACTION NO. H-92-3909
PHILLIPS PETROLEUM COMPANY, ET AL., Defendants	§	

ORDER OF SUMMARY JUDGMENT

Pending before the Court in the above referenced action for declaratory judgment and damages under the Worker Adjustment and Retraining Notification Act ("WARN"), 29 U.S.C. §§ 2101-2109, for failure to provide employees with a sixty-day notification prior to termination because of a mass layoff, and seeking class certification are the following motions:

(1) Defendants Phillips Petroleum Company, W. Wayne Allen, and C.J. Silas's motion for summary judgment (instrument #4) and amended motion for summary judgment (#13) for failure to state a claim, under Fed. R. Civ. P. 12(b) and 56;

(2) Plaintiffs Cynthia Williams, Lorenzo Harris, Shelly Hill, Hallie Cloud, and Frelander Yarbrough, Jr.'s motion for continuance to conduct discovery to answer the above motion (#14);

(3) Plaintiffs' cross-motion for summary judgment (#14);

(4) Plaintiffs' motion to strike Defendants' amended notion for summary judgment and Rule 11 sanctions (#15).

(5) Defendants' motion for leave to amend Defendants' motion for summary judgment, if necessary (#17);

(6) Defendants' motion for sanctions (#21);

(7) Plaintiffs' motion for leave to supplement original complaint after discovery (#23);

(8) Plaintiffs' motion to strike the amended affidavit of J.D. Fultz (#24);

(9) Plaintiffs' motion to join new parties (#33);

(10) Defendants' request for referral to a magistrate judge, motion for discovery and motion conference and motion for stay of discovery pending ruling on motions (#34); and

(11) Plaintiffs' motion to compel (#36).

While Plaintiffs claim that they filed a motion for interlocutory default, there is none in the file or listed on the docket sheet. However, because it is a frivolous challenge

in light of Defendants' timely appearance in the form of a motion for summary judgment, the Court considers the matter moot.

Defendants' motions for summary judgment argue that as a matter of law they could not have violated WARN. They explain that under specific circumstances WARN requires "covered employers" to provide employees with a sixty-day notice of termination because of a "mass layoff." A mass layoff is defined as either any employment loss involving at least one-third of the employees and at least fifty employees at a single site of employment, or 500 employees. Defendants contend that they did not lay off fifty or more employees at one site and that Plaintiffs cannot aggregate employees working at "[n]on-contiguous sites in the same geographic area which do not share the same staff or operational purpose." 20 C.F.R. § 639.3(i). While groups of structures on a campus or in an industrial park or separate facilities divided by a street may constitute a single site of employment, two plants on opposite sides of town that employ different workers do not. 20 C.F.R. § 639.3(i)(1) & (4); United Mine Workers v. Harman Mining Corp., 780 F. Supp. 375 (W.D. W. Va. 1991). Furthermore layoffs must occur within ninety days of each other, not the case here, for purposes of aggregation. 29 U.S.C. § 2102(d). Five of the named Plaintiffs worked at the Houston Chemical Complex ("HCC") in Pasadena, where twenty-seven employees were laid off over a ten-month period between December 1991 and September 1992. One worked at Phillips Gas Holding Company, Inc. ("PGHC"), where eight employees were laid off.[3] Neither instance constituted a mass layoff and

[3] J.D. Fultz's amended affidavit reduces this number of employees terminated at the Pasadena HCC and reassigns them to Phillips' Clear Lake facility. In any case, there is no effect on Defendants' contention that as matter of law it could not have violated WARN.

therefore there was no notice obligation under WARN. Even if the HCC and PGHC (and Clear Lake) terminated employees were aggregated, an improper procedure here, the total would be less than the minimum fifty employees required to trigger WARN. They submit a supporting affidavit from J.D. Fultz, Manager of Employee Relations at Phillips Petroleum Company, which was subsequently amended to show that four employees previously identified with the Pasadena HCC site were actually at other Phillips sites. (The amendment attached to one of Defendants' responses, #20.) See footnote 1.

Defendants also contend that any class allegations should be dismissed because none of the named Plaintiffs is an adequate class representative with viable class claims. East Texas Motor Freight System, Inc. v. Rodriquez, 431 U.S. 395 (1977).

Moreover Defendants point out that a "covered employer" under WARN is any "business enterprise" that employs 100 or more employees. 29 U.S.C. § 2101. Individual Defendants Allen and Silas are not business enterprises and do not employ personally 100 or more employees. WARN does not expressly provide for liability of agents of covered employers, and therefore these two individuals should be dismissed.

Secondly Defendants are entitled to summary judgment because following their terminations, all named Plaintiffs signed releases of their claims in exchange for enhanced benefits. Defendants provide copies of these instruments, which release all claims that "relate either to the

---

Defendants state that PGHC laid off thirty-one employees in Bartlesville, Oklahoma and one in Washington, D.C., but these are distinctly separate sites of employment from those around Houston.

time of my employment or to the termination of my employment" and expressly include the "Company's right to layoff its employees at will . . . ."

Third, because WARN lacks a statute of limitations, the Court should utilize a federal statute of limitations if it is more analogous than state statutes and if federal policies behind a statute are frustrated by the state statutes. Lampf, Pleva, Lipking, Purpis & Petigrew v. Gilbertson, 111 S. Ct.1773,2777-89(1991) (narrow exception to general rule that in the absence of an express federal statute of limitations, court should borrow analogous state statue). Defendants urge that for this labor dispute it is appropriate to borrow the six-month limitation period under the National Labor Relations Act (NLRB), 29 U.S.C. § 160(b). Newspaper and Mail Deliverers'Union v. United Magazine Company,809F. Supp. 185 (E.D.N.Y. 1992)(NLRB's six-month limitations period applied to WARN action). Defendants argue that the claims of three plaintiffs, i.e., Williams, Hill and Harris, are time-barred. Williams and Hill were terminated on March 26, 1992, while Harris was terminated on March 4, 1992. Because the Court finds that Plaintiffs failed to state a claim under WARN, it does not reach this issue.

Plaintiffs have filed every kind of conclusory and frivolous objection and allegation conceivable and have moved for additional time to do discovery. However, the issues here are a matter of law. Because the Court concludes that Defendants have shown that Plaintiffs have not and cannot state a viable cause of action under WARN and because they have released their claims on this matter, the will not countenance wasting additional time and energy of all involved. Accordingly, the Court

ORDERS that summary judgment is GRANTED in favor of Defendants against Plaintiffs. All other pending motions are MOOT.

SIGNED at Houston, Texas, this 14th day of June, 1993

/s/ Melinda Harmon

MELINDA HARMON
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
FILED
JUN 15 1993
Michael N. Milby, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CYNTHIA WILLIAMS; LORENZO HARRIS; SHELLY HILL; HALLIE CLOUD; FRELANDER YARBROUGH,JR; DONALD JACKSON, CLYDE WARNER; DWJANA LAWSON; JACKIE MARTIN; HUEY CUNNINGHAM, Individually and On behalf of All Others Similarly Situated, Plaintiffs,	§	
VS.	§	CIVIL ACTION NO. H-92-3909
PHILLIPS PETROLEUM COMPANY; W WAYNE ALLEN; C.J. PETE SILAS Defendants.	§	

NOTICE OF APPEAL TO THE FIFTH CIRCUIT COURT OF APPEALS FROM A FINAL JUDGMENT

TO THE HONORABLE COURT:

Notice is hereby given that the Plaintiffs, CYNTHIA WILLIAMS; LORENZO HARRIS; SHELLY HILL; HALLIE CLOUD; FRELANDER YARBROUGH, JR; DONALD JACKSON; CLYDE WARNER; DWJANA LAWSON; JACKIE MARTIN; HUEY CUNNINGHAM,

individually and on behalf of

all others similarly situated, hereby appeal to the United States Court of Appeals for the Fifth Circuit from the final judgment entered in this action on the 8th day of June, 1993.

Respectfully submitted,

/s/ Julius J. Larry, III
JULIUS J. LARRY, III
River Oaks Tower
3730 Kirby Drive, Suite 1180
Houston, Texas 77098
TSB: 11954675
Fed. Id: 14030
Telephone (713) 942-0320
Fax: (713) 942-0401
ATTORNEY IN CHARGE FOR
DEFENDANTS, CYNTHIA WILLIAMS;
LORENZO HARRIS; SHELLEY HILL;
HALLIE CLOUD; FRELANDER
YARBROUGH, JR.; DONALD JACKSON;
CLYDE WARNER; DWJANA LAWSON;
JACKIE MARTIN; and HUEY CUNNINGHAM

OF COUNSEL:

JUSTICE CENTER - HOUSTON

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Notice of Appeal to the Fifth Circuit Court of Appeals from a Final Judgment, has been served on defendants, by and through their attorney of record, by certified mail, return receipt requested on this 5th day of June, 1993, to:

KERRY E. NOTESTINE
BRACEWELL & PATTERSON
2900 SOUTH TOWER
PENNZOIL PLACE
HOUSTON, TEXAS 77002

ROBERT J. FRIES
PHILLIPS PETROLEUM COMPANY
1238 ADAMS BUILDING
BARTLESVILLE, OKLAHOMA 74004

/s/ Julius J. Larry III
JULIUS J. LARRY, III

APPENDIX C

MAR 31, 1994 9:23AM No. 1976 P. 1/1

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

CHARLES R. FULBRUGE III
CLERK

TEL.504-
608 CAMP STREET
NEW ORLEANS,LA 7

March 30, 1994

TO ALL COUNSEL OF RECORD:

No. 93-2478 - Williams v. Phillips Petroleum Co.

Dear Counsel:

The Court directs the parties to be prepared to discuss, at oral argument, whether this Court should award the appellees damages under Fed. R. App. P. 38, including double costs and attorneys' fees. Appellees' counsel shall deliver to appellants' counsel, and shall file with the Court, by 4:00 p.m. April 4, 1994, a statement of appellees' reasonable expenses and attorneys' fees on appeal (including an estimate for fees and expenses for oral argument), so that the parties can be prepared, in argument, to discuss those amounts.

Very truly yours,

CHARLES R. FULBRUGE III, Clerk

By: /s/ Geralyn A. Maher
Geralyn A. Maher
Calendar Clerk

/gam

Mr. Julius J. Larry, III
Messrs. Kerry E. Notestine and
Robert J. Fries

	1
To Kim Gee Bracewell Firm	From Geralyn Calendar Circuit Clerk's Office 6071
Fax # 713-221-1212	Fax # 504/589 4834

DAMAGES FOR DELAY

FRAP 38.

If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee.

BRACEWELL & PATTERSON
2900 SOUTH TOWER PENNZOIL PLACE
HOUSTON, TEXAS 77002-2781
713 223 2900
FAX 713 221 1212
TELEX 76 2141

100 CONGRESS AVENUE
AUSTIN, TEXAS 78701-4042
512 472 7800

4000 LINCOLN PLAZA
500 N AKARD
DALLAS, TEXAS 75201-3320
214 740 4000

KERRY E. NOTESTINE
PARTNER

2000 K STREET N.W.
WASHINGTON, D.C. 20006-1809
202 828 5800

43 BROOK STREET
LONDON WIY 2BL
071 355 3330

April 2, 1994

Mr. Charles R. Fulbruge III
Clerk
United States Court of Appeals
Fifth Circuit
Office of the Clerk
600 Camp Street
New Orleans, Louisiana 70130

Re: No. 93-2478; *Cynthia Williams; Lorenzo Harris; Shelly Hill; Hallie Cloud; Frelander Yarbrough, Jr.; Donald Jackson, Individually and on Behalf of all others similarly situated, v. Phillips Petroleum Company; W. Wayne Allen; C.J. Pete Silas*; In the United States Court of Appeals for the Fifth Circuit; (D.C. No. CA-H-92-3909)

Dear Mr. Fulbruge:

As directed in this court's letter of March 30, 1994, the appellees' submit the following calculation of its reasonable expenses and

attorneys' fees on appeal of the above referenced case, including estimated expenses for oral argument:

ATTORNEYS' FEES

Attorney	Fees per Attorney
Kerry Notestine	$26,489.00
(39.1 hrs @ $190/hr + 95.3 hrs @ $200/hr)	
Kimberly Gee	$ 870.00
(7.25 hrs @ $120/hr)	
Robert Fries	$ 2,189.25
(15.75 hrs @ $139/hr)	
J.L. Wilford	$ 69.50
(.5 hr @ $139/hr)	
Paralegal	**Fees per Paralegal**
Sharon Rubin	$ 65.00
(1 hr @ $65/hr)	
Cindy Soloman	$ 3,348.25
(56.75 hrs @ $59/hr)	
TOTAL ATTORNEYS' FEES:	**$33,031.00**

ITEMIZATION OF COSTS

Computerized Legal Research	**$ 1,283.42**

Telecommunications	$ 63.34
Postage	$ 302.65
Supplies	$ 111.55
Copies	$ 280.25
Travel to and Stay in New Orleans* (Kerry Notestine and Robert Fries)	$ 800.00

* estimated

TOTAL COSTS: $ 2,841.21

By copy of this letter, opposing counsel has been served with a copy of the foregoing.

Very truly yours,

Bracewell & Patterson, L.L.P.
/s/ Kerry E. Notestine / KG by permission
Kerry E. Notestine

KEN/vlp
cc: Mr. Julius J. Larry, III
River Oaks Tower
3730 Kirby Drive, Suite 1200
Houston, TX 77098
By hand delivery and
(CMRRR NO: P 365 711 558)

BRACEWELL & PATTERSON
2900 SOUTH TOWER PENNZOIL PLACE
HOUSTON, TEXAS 77002-2781
713 223 2900
FAX 713 221 1212
TELEX 76 2141

100 CONGRESS AVENUE
AUSTIN, TEXAS 78701-4042
512 472 7800

4000 LINCOLN PLAZA
500 N AKARD
DALLAS, TEXAS 78201-3320

KERRY E. NOTESTINE
PARTNER

2000 K STREET N.W.
WASHINGTON, D.C. 20006-1809
202 828 5800

43 BROOK STREET
LONDON WIY 2BL
071 355 3330

April 4, 1994

BY FEDERAL EXPRESS

Re: No. 93-2478; *Cynthia Williams; Lorenzo Harris; Shelly Hill; Hallie Cloud; Frelander Yarbrough, Jr.; Donald Jackson, Individually and on Behalf of all others similarly situated, v. Phillips Petroleum Company; W. Wayne Allen; C.J. Pete Silas*; In the United States Court of Appeals for the Fifth Circuit; (D.C. No. CA-H-92-3909)

Dear Mr. Fulbruge:

Based upon this Court's March 30, 1994 notice to counsel regarding the appropriateness of sanctions against the appellants under Federal Rule of Appellate Procedure Rule 38, Appellees submit the following summary of acts relevant to that determination as follows:

1. This frivolous lawsuit was initiated under the Worker Adjustment and Retraining Notification Act (WARN) despite the fact that a rudimentary investigation would have revealed that defendants-appellees (defendants) did not lay off a sufficient number of workers at any single site of employment at which the original plaintiffs worked to trigger WARN notice

obligations. Moreover, defendants established the validity of releases signed by plaintiffs-appellees (plaintiffs) releasing their claims under WARN; there is no evidence that the releases were not signed knowingly and voluntarily; and plaintiffs ratified the releases by not returning the consideration that the defendants paid to them;

2. Plaintiffs never offered any basis on which the district court could have found for the plaintiffs and to date have not asserted any reason justifying reversal of the district court's judgment as the law simply does not support plaintiffs' appeal;

3. Plaintiffs perpetuated scurrilous and baseless attacks on the integrity and ethics of the district court and defendants' counsel without foundation. Defendants responded to these attacks at the district court level, yet without any credible evidence plaintiffs continued to disparage and malign defendants' counsel's character. Specifically, plaintiffs attempt to support these unfounded assertions by:

a. misquoting defendants' counsel's time records,

b. not including the entire description of counsel's activities, and

c. drawing unsupported conclusions;

4. In addition, plaintiffs initiated another unjustified attack on defense counsel's character by questioning the appropriateness of advising this Court of pertinent and significant authorities that came to defendants' attention after the briefs were filed, despite language Rule 28(j) of the Federal Rules of Appellate Procedure specifically authorizing such contact with this court. *See* Appellants' Motion to Supplement the Record, attached as Exhibit 2.

This conduct clearly warrants sanctions and is consistent with plaintiffs' actions before the district court. Plaintiffs and their

counsel failed to adequately invesitgate the theories underlying their claims against the defendants and filed other meritless pleadings and responses, including: (1) stating that they were moving for a default judgment, despite never actually filing the motion and the clerk never having entered a default as required under Rule 55 of the Federal Rules of Civil Procedure; and (2) attempting to join new parties after the district court's dismissal of this lawsuit. As the district court noted in its order of summary judgment:

> Plaintiffs have filed every kind of conclusory and frivolous objection and allegation conceivable and have moved for additional time to do discovery. However, the issues here are a matter of law. Because the Court concludes that Defendants have shown that Plaintiffs have not and cannot state a viable cause of action under WARN and because they have released their claims on this matter, the Court will not countenance wasting additional time and energy of all involved.

As the above demonstrates and based upon the law of this circuit, defendants are entitled to sanctions based on plaintiffs' and their attorney's actions in prosecuting this appeal. *Carmon v. Lubrizol Corporation*, ___ F.3d ___ (5th Cir. March 31, 1994), attached as Exhibit 3 (citing Fed. R. App. P. 38; *Montgomery v. United States*, 993 F.2d 348, 350 (5th Cir. 1991) (quoting *Coghlan v. Starkey*, 852 F.2d 806, 811 (5th Cir. 1988); *Caldwell v. Palmetto State Sav. Bank*, 811 F.2d 916, 919 (5th Cir. 1987)). As instructed, defendants are prepared to discuss this issue further at oral argument.

Very truly yours,

Bracewell & Patterson, L.L.P.
/s/ Kerry E. Notestine/ KG by permission
Kerry E Notestine

KEN/vlp

cc: Mr. Julius J. Larry, III
River Oaks Tower
3730 Kirby Drive, Suite 1200
Houston, TX 77098
By hand delivery and
(CMRRR NO: P 365 711 559

JULIUS J. LARRY, III
Attorney and Counselor at Law
River Oaks Tower
3730 Kirby Drive, Suite 1180
Houston, Texas 77096
(713) 942-0320
FAX (713) 942-0401

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RJF

April 13, 1994

Mr. Charles R. Fulbruge
United States Court of Appeals
Fifth Circuit
Office of the Clerk
600 Camp Street
New Orleans, Louisiana 70130

RE: Williams, et al v. Phillips Petroleum, et al; In the United States Court of Appeals for the Fifth Circuit; No. 93-2478 "Who Must Receive Notice Pursuant to WARN Act"

Dear Mr. Fulbruge:

Enclosed for filing in the above-referenced cause of action, please find four originals and one copy of the Letter to Circuit Judge Rhesa H. Barksdale. Please file in your usual manner; forward the remaining three originals to the Judges named and return the file-stamped copy to me in the self-addressed, stamped envelope provided.

Thank you for your assistance in this matter.

Sincerely,

/s/ Julius J. Larry, III/ by permission
Julius J. Larry III
Attorney at Law

cc: Kerry E. Notestine

Julius J. Larry, III
Attorney and Counselor at Law
River Oaks Tower
3730 Kirby Drive, Suite 1180
Houston, Texas 77098
(713) 942-0320
FAX (713) 942-0401

April 13, 1994

Circuit Judge Rhesa H. Barksdale
245 E. Capitol Street
Room 200
Jackson, Mississippi 39201

RE: Williams, et al v. Phillips Petroleum, et al; In the United States Court of Appeals for the Fifth Circuit; No. 93-2478

"Who Must Receive Notice Pursuant to WAARN Act"

Dear Judge Barksdale:

The purpose of this letter is to clarify the cite to the provisions which support our position that once the WARN Act is triggered, notice have to be given to all affected employees at all sites. I misspoke when you asked me to cite the provision of the Code of Federal Regulations where such interpretation is found. I told you that it was 20 CFR 639.5. It is 20 DFR 639.6 that sets out the statutory language, but 54 Fed. Reg. 16047 gives the proper interpretation. The Court questioned the proprietary of how I deduced that all affected employees should receive notice once the WARN Act is triggered at any single site of employment. I will not clarify my response. I initially read the Department of Labor interpretation. I then read this interpretation in the Corporate Counsel's Guide to Reductions-in-Force.

Section 2.015, paragraph 2 of the Corporate Counsel's Guide states the following:

2. Affected Employees at other Sites

> "Affected employee(s)" include employees who work at sites other than the one where a mass layoff or plant closing has occurred. Although terminations of such workers at other sites are not counted in determining whether the WARN numerical thresholds have been met, once the obligation to give notice arises, it extends to workers at other sites who are likely to lose their jobs *because* of a mass layoff or plant closing at another site. DOL Comments at 54 Fed. Reg. 16047. (S e e, Exhibit A).

I then instructed one of Justice Center's law clerks to pull up 54 Fed. Reg. 16047 on WESTLAW or LEXIS. (See, Exhibit B). I read 54 Fed. Reg. 16047 and agreed with the Corporate Counsel's Guide. I read the WARN Act and the Department of Labor regulations and Final Rules. I discussed the WARN Act principles with numerous other lawyers. I am 100% sure that we are correct when we say that a WARN event was triggered in Bartlesville, Oklahoma. Those six (6) buildings next door to each other and across the street and 1 ½ miles down the street should be construed as a single site of employment. This interpretation is consistent with the DOL interpretation and with Carpenters Dist. Council of New Orleans v. Dillard Department Stores, Nos. 92-3419, 92-3613 (5th Cir. Feb. 22 1994).

This Court should apply Dillard Department Stores to this case. Phillips' argument about non-contiguous sites is totally irrelevant. Geographic proximity is irrelevant. Once WARN is triggered at any single site of employment, all affected Employees must receive proper written notice. These Plaintiff-Appellants have standing because they were "affected Employees" who suffered an "employment loss" within the meaning of the WARN Act. They did not receive 60 days pay in lieu of notice.

Genuine issues of material fact are raised regarding the Bartlesville site being deemed a single site of employment. To the extent that the District Court refused to allow discovery, the matter should be reversed.

Regarding the release issue, time ran out before I was able to address it. Phillips owed the affected Employees sixty days pay plus benefits at the time the Releases were signed. That debt was separate and apart from "severance pay". The Employees have not waive their 60 days pay. Phillips owes that amount to this day and refuses to pay. Other companies paid their separating employees 60 days pay in lieu of notice. Phillips did not do so in the March 1992 lay-off. I was informed that Phillips paid 60 days pay to the last round of terminees, after these affected Employees sued.

The Supreme Court, in Alexander v. Gardner-Denver Co. 415 U.S. 36 (1974), teaches us that in order for a release of employment rights to be valid and enforceable, it must be executed both "knowingly" and "voluntarily". No attorney in this country could have read Phillips' Release and ascertained that the affected Employees were giving up 60 days pay plus benefits and waiving all of their rights under the WARN Act. The "knowingly" test was not met. As a practical matter, no Employee who is being kicked out of a company after years of loyal and dedicated service, is going to make a "gift" to the company of 60 days pay. The "voluntariness" test is not met.

Also, the Release contains Exception 3(d) which Phillips has never presented summary judgment evidence to refute. The affected Employees whose employment rights were violated have the right to seek a remedy provided by Congress. The Releases are invalid and unenforceable to extinguish a pre-existing legal obligation.

I did not get an opportunity to discuss the WARN Act statute of limitations issue. However, we rest on the Second Circuit's reasoning and opinion in United Paperworks International Union and Local 340 v. Specialty Paperboard, Inc., 999 F.2d 51 (2nd Cir. 1993) and urge this Court to adopt that reasoning and opinion in this case.

Regarding sanctions, I take full responsibility for everything that Justice Center's former Paralegal typed in the Brief and Reply Brief, whether bad or good. Mistakes were made. I discussed this matter with her, recently. She stated that, originally, she typed the

entire billing statements and perceived a page-limitation problem. I instructed her to edit out everything that was not pertinent to the contacts that were relevant. Although I did not stand over her and watch her type, she was under my supervision.

Generally she uses Spellcheck and I proofread or someone else will proofread. This Brief was proofread by another lawyer and by me. It was rushed to the printer in New Orleans. Usually, the printer does the final pagination and Table of Contents pages. I take full responsibility for rushing the printer, which may have caused him to forget to do a final pagination. If these errors are sanctionable, I accept the sanctions. There was never any intention on any of our parts to mislead the Court. We believe that the cites to the Record were correct. They were at least double-checked.

Our cause is Righteous and our position is legally correct, despite the non-issues raised by Phillips, such as "aggregation"; "non-contiguous sites"; lack of geographic proximity", etc. This case should be reversed and remanded so that the Employees may develop, through discovery, all facts necessary under Dillard Department Stores.

I hereby certify that a true and correct copy of the advice, letter and enclosures have been duly served upon counsel of record in this case, by certified mail, return receipt requested, this 13th day of April, 1994.

Hopefully, this clarification is helpful such that you will not have to research it yourself. We, again urge the Court to reverse and remand this case consistent with 5th Circuit precedence and DOL interpretations.

Thank you very much. Please discuss this letter with the other Judges.

Very Truly Yours,

/s/ Julius J. Larry III /ap. by permission
Julius J. Larry III
Attorney at Law

April 13, 1994
Judge Rhesa H. Barksdale
RE: Williams, et al v. Phillips Petroleum, et al
Page Five (5)

cc: Kerry E. Notestine
Bracewell & Patterson
2900 South Tower
Pennzoil Place
Houston, Texas 77002
[with attachments]

Robert Fries
1238 Adams Building
Bartlesville, Oklahoma 74004
[with attachments]

Thomas J. Jackson
Thomas Jackson & Associates
5251 Westheimer
Suite 860
Houston, Texas 77056
[with attachments]

Circuit Judge Jerry Smith
515 Rusk Ave
Room 12621
Houston, Texas 77002
[with attachments]

Western District Judge Donald Walter
300 Fannin Street
Suite 4200
Shreveport, Louisiana 71101
[with attachments]

CORPORATE COUNSEL'S GUIDE TO

REDUCTIONS IN FORCE

B
L Published by: BUSINESS LAWS, INC.
I William A. Hancock, Editor

PLAINTIFF'S
EXHIBIT
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VI. Transfers of Employees to a Successor Employer in the Context of Subcontracting or a Change of the Prime Contractor: The WARN Obligation

Although the seller and buyer in a sale of a business generally need not give notice when workers are hired by the buyer, WARN may treat differently a circumstance in which workers move to a new employer because work previously performed by their former employer has been subcontracted to their new employer, or because the prime contractor on a project has changed. The regulations state that notice must be given when employees are terminated by one employer and rehired by the new contractor performing the same work. This is significant for government contractors who may react to a contract loss by "terminating" workers with the understanding that they will shift to the payroll of the new contractor. DOL Comments at 54 Fed. Reg. 16048.

WARN would appear to obligate the contractor to give notice (assuming the critical mass is reached) to workers it will terminate, even though its employees will be immediately reemployed. If the subject workers are "project workers," notice need not be given. Moreover, if the employees "quit" to go to work for the successor, there is no WARN obligation. This suggests that employers should pay attention to the form and reality of the transactions that cause their employees to shift to a new employer.

VII. Employees and Organizations to Whom the WARN Notice Must be Given

A. Notice Must Be Supplied Directly to "Affected Employees" Who Are Not in a Bargaining Unit

WARN states that all "affected employees" must receive the notice required in a mass layoff or plant closing. "Affected employees" are those who may reasonably be expected to

experience an "employment loss" as a result of a mass layoff or plant closing. Notice to unrepresented employees is accomplished by delivering written notice to each employee.

1. Affected Part-Time Employees;

"Affected employee(s)" include part-time workers, although, as noted above, terminations of part-time workers do not count in determining whether numerical thresholds for a plant closing or mass layoff have been reached. DOL Comments at 54 Fed. Reg. 16058./12/

2. Affected Employees at Other Sites

"Affected employee(s)" include employees who work at sites other than the one where a mass layoff or plant closing has occurred. Although terminations of such workers at other sites are not counted in determining whether the WARN numerical thresholds have been met, once the obligation to give notice arises, it extends to workers at other sites who are likely to lose their jobs because of a mass layoff or plant closing at another site. DOL Comments at 54 Fed. Reg. 16047.

3. Affected Employees Already on Temporary Layoff

Employees on layoff with a reasonable expectation of recall must receive a WARN notice when a mass layoff or plant closing alters the expectation of recall. *Jones v. Kayser-Roth Hosiery, Inc.*, 748 F.Supp. 1276 (E.D. Tenn. 1990).

4. Employees Who May, But Are Not Certain to, Lose Their Jobs.

In many situations it may be difficult to determine sixty days in advance precisely which employees will be terminated as a result of a plan to reduce the workforce. This is particularly true when early retirement incentives are being offered and complete bumping rights exist, or when several offers of transfers (involving relocation) are outstanding. A careful approach would dictate a

widely distributed notice that acknowledges the difficulty of determining in advance precisely which employees will be involuntarily terminated. That notice may later be supplemented as the situation and status of employees becomes clear.

B. Notice Is Delivered to the Union for Affected Employees in a Bargaining Unit.

Notice to affected employees who are part of a bargaining unit is accomplished by delivering a single notice to the union. In situations when a collective bargaining agreement recognizes a national and local union, notice to the chief elected officer of both entities is required. 54 Fed. Reg. 16058. This notice is sufficient even for nonmembers of the union who are in the bargaining unit.

C. Notice to Government Officials

WARN also provides that notice of a mass layoff or plant closing be provided to the chief elected official of the local government and to the state dislocated worker unit. 29 U.S.C. § 2102(a)(2).

may be well advised to base its decision on the number of positions to be eliminated, which is a known fact at the relevant time.

FN1 The figure of 65 days is used as an approximation of the number od days it will take to identify workers and to prepare and serve notices 60 days in advance of a planned action.

Commentors raised the question whether notice extends to bumpees who may be bumped at other employment sites (to the extent that can be identified when notice is required to be given). DOL interprets the definition of affected employees to include such workers, who are, therefore, entitled to receive notice. It should be noted, however, that workers who suffer an

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(Cite as: 54 FR 16042, *16047)

employment loss at another single site of employment are not counted in determining whether plant closing or mass layoff coverage thresholds are met. (DOL notes again the caution that the employer must evaluate the facts as they appear when it must make its decision to give notice.) Thus, if an employer closes an operating unit which employs 55 workers and, because of crossplant bumping rights, 6 workers at another site lose their jobs, (and if these facts can be accurately predicted 65 days in advance of the closing date) the plant closing threshold has not been met at the first site. It is also possible that en employment action that affects large numbers of workers may trigger a second covered action at a separate site if enough workers lose their jobs through cross-plant bumping.

A commentor suggested that "the regulations should specify that consultant or contract employees employed by another employer or self-employed are not counted toward the threshold for determining employer coverage. *DOL agrees with this proposition, as long as the separate employment relationship is established under existing legal rules. It is specifically covered in section 639.3(e).

(f) Section 639.3 (f) Definition of "Employment Loss"

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This section defines "employment loss" and exclusions from employment loss when certain transfers occur. These definitions closely follow the language of the statute. The proposed regulation provide that workers who retained "full employment status" could be reassigned without suffering employment loss. The Department notes that it interprets the

statutory terms "termination" and "layoff" in section 3(a)(6) to be distinguishable and to have their common sense meanings. Thus, for the purposes of defining "employment loss" the term "termination" means the permanent cessation of the employment relationship and the term "layoff" means the temporary cessation of that relationship.

A number of commentors questioned the use of the term "full employment status" in section 639.3(f)(2). They argued that this concept, if broadly applied to mean that an employee can be reassigned only if he/she retains full pay and benefits, is inconsistent with the statutory definition of employment loss and with employers' rights to reassign workers.

The intent of the "full employment status" language was to deal with a specific comment from a major employer which has a program for moving workers who are to be terminated or laid off for a long time into job-finding or retraining activities, all at full pay and benefits. The "full employment status" language was an attempt to distinguish this kind of program an employee is not working at his old job but is retained on the payroll

APPENDIX D.

PART I.
Text of WARN from 29 U.S.C.S. § 2101 *et seq.*

§ 2101. Definitions; Exclusions from Definition of Loss of Employment

(a) Definitions: As used in this Act [29 U.S.C.S. §§ 2101 *et seq.*]

(1) the term "employer" means any business enterprise that employs —

(A) 100 or more employees, excluding part-time employees; or

(b) 100 or more employees who in the aggregate work at least 4,000 hours per week (exclusive of hours of overtime);

(2) the term "plant closing" means the permanent or temporary shutdown of a single site of employment, or one or more facilities or operating units within a single site of employment, if the shutdown results in an employment loss at the single site of employment during any 30-day period for 50 or more employees excluding any part-time employees;

(3) the term "mass layoff" means a reduction in force which --

(A) is not the result of a plant closing; and

(B) results in an employment loss at the single site of employment during any 30-day period for —

(i)(I) at least 33 percent of the employees (excluding any part-time employees); and

(II) at least 50 employees (excluding any part-time employees; or

(ii) at least 500 employees (excluding any part-time employees);

(4) the term "representative" means an exclusive representative of employees within the meaning of section 9(a) or 8(f) of the National Labor Relations Act (29 U.S.C. 159(a), 158(f) or section 2 of the Railway Labor Act (45 U.S.C. 152);

(5) the term "affected employees" means employees who may reasonably be expected to experience an employment loss as a consequence of a proposed plant closing or mass layoff by their employer;

(6) subject to subsection (b), the term "employment loss" means (A) an employment termination, other than a discharge for cause, voluntary departure, or retirement. (B) a layoff exceeding 6 months, or (C) a reduction in hours of work of more than 50 percent during each month of any 6-month period;

(7) the term "unit of local government" means any general purpose political subdivision of a State which has the power to levy taxes and spend funds, as well as general corporate and police powers; and

(8) the term "part-time employee" means an employee who is employed for an average of fewer than 20 hours per week or who has been employed for fewer than 6 of the 12 months preceding the date on which notice is required.

(b) Exclusions from definition of employment loss. (1) In the case of a sale of part or all of an employer's business, the seller shall be responsible for providing notice for any plant closing or mass layoff in accordance with section 3 of this Act [29 U.S.C.S. § 2102], up to and including the effective date of the sale. After the effective date of the sale of part or all of an employer's business, the purchaser shall be responsible for providing notice for any plant closing or mass layoff in accordance with section 3 of this Act [29 U.S.C.S. § 2102]. Notwithstanding any other provision of this Act [29 U.S.C.S. §§ 2101 *et seq.*], any person who is an employee of the seller (other than a part-time employee) as of the effective date of the sale shall be considered an employee of the purchaser immediately after the effective date of the sale.

(2) Notwithstanding subsection (a)(6), an employee may not be considered to have experienced an employment loss if the closing or layoff is the result of the relocation or consolidation of part or all of the employer's business and, prior to the closing or layoff —

(A) the employer offers to transfer the employee to a different site of employment within a reasonable commuting distance with no more than a 6-month break in employment; or

(B) the employer offers to transfer the employee to any other site of employment regardless of distance with no more than a 6-month break in employment, and the employee accepts within 30 days of the offer or of the closing or layoff, whichever is later.

§ 2102 Notice Required before Plant Closing and Mass Layoffs

(a) Notice to employees, state dislocated worker units, and local governments. An employee shall not order a plant closing or mass layoff until the end of a 60-day period after the employer serves written notice of such an order —

(1) to each representative of the affected employees as of the time of the notice or, if there is no such representative at that time, to each affected employee; and

(2) to the State dislocated worker unit (designated or created under title III of the Job Training Partnership Act [29 U.S.C.S. §§ 1651 *et seq.*) and the chief elected official of the unit of local government within which such closing or layoff is to occur.

If there is more than one unit, the unit of local government which the employer shall notify is the unit of local government to which the employer pays the highest tax for the year preceding the year for which the determination is made.

(b) Reduction of notification period. (1) An employer may order the shutdown of a single site of employment before the conclusion of the 60-day period if as of the time that notice would have been required the employer was actively seeking capital or business which, if obtained, would have enabled the employer to avoid or postpone the shutdown and the employer reasonably and in good faith believed that giving the notice required would have precluded the employer from obtaining the needed capital or business.

(2)(A) An employer may order a plant closing or mass layoff before the conclusion of the 60-day period if the closing or mass layoff is caused by business circumstances that were not reasonably foreseeable as of the time that notice would have been required.

(B) No notice under this Act [29 U.S.C.S. §§ 2101 *et seq.*] shall be required if the plant closing or mass layoff is due to any form of natural disaster, such as a flood, earthquake, or the drought currently ravaging the farmlands of the United States.

(3) An employer relying on this subsection shall give as much notice as is practicable and at that time shall give a brief statement of the basis for reducing the notification period.

(c) Extension of layoff period. A layoff of more than 6 months which, at its outset, was announced to be a layoff of 6 months or less, shall be treated as an employment loss under this Act [29 U.S.C.S. §§ 2101 *et seq.*] unless —

(1) the extension beyond 6 months is caused by business circumstances (including unforeseeable changes in price or cost) not

reasonably foreseeable at the time of the initial layoff; and

(2) notice is given at the time it becomes reasonably foreseeable that the extension beyond 6 months will be required.

(d) Determinations with respect to employment loss. For purposes of this section in determining whether a plant closing or mass layoff has occurred or will occur, employment losses for 2 or more groups at a single site of employment, each of which is less than the minimum number of employees specified in section 2(a)(2) or (3) [29 U.S.C.S. § 2101 (a)(2) or (3)] but which in the aggregate exceed that minimum number, and which occur within any 90-day period shall be considered to be a plant closing or mass layoff unless the employer demonstrates that the employment losses are the result of separate and distinct actions and causes and are not an attempt by the employer to evade the requirements of this Act [29 U.S.C.S. §§ 2101 *et seq*,]

§ 2103. Exemptions

This Cat [29 U.S.C.S. §§ 2101 *et seq.*] shall not apply to a plant closing or mass layoff if —

(1) the closing is of a temporary facility or the closing or layoff is the result of the completion of a particular project or undertaking, and the affected employees were hired with the understanding that their employment was limited to the duration of the facility or the project or undertaking; or

(2) the closing or layoff constitutes a strike or constitutes a lockout not intended to evade the requirements of this Act [29 U.S.C.S. §§ 2101 *et seq.*]. Nothing in

this Act [29 U.S.C.S. §§ 2101 *et seq.*] shall require an employer to serve written notice pursuant to section 3(a) of this Act [20 U.S.C.S.§§ 2101(a)] when permanently replacing a person who is deemed to be an economic striker under the National Labor Relations Act: Provided, The nothing in this Act [29 U.S.C.S. §§ 2101 *et seq.*] shall be deemed to validate or invalidate any judicial or administrative ruling relating to the hiring of permanent replacements for economic strikers under the National Labor Relations Act.

§ 2104. Administration and Enforcement of Requirements

(a) Civil actions against employers. (1) Any employer who orders a plant closing or mass layoff in violation of section 3 of this Act [29 U.S.C.S. § 2102] shall be liable to each aggrieved employee who suffer an employment loss as a result of such closing or layoff for —

(A) back pay for each day of violation at a rate of compensation not less than the higher of —

(i) the average regular rate received by such employee during the last 3 years of the employee's employment; or

(ii) the final regular rate received by such employee; and

(B) the benefits under an employee benefit plan described in section 3(3) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 100 (3)), including the cost of medical expenses incurred during the employment loss

which would have been covered under an employee benefit plan if the employment loss had not occurred.

Such liability shall be calculated for the period of violation, up to a maximum of 60 days, but in no event for more than one-half the number of days the employee was employed by the employer.

(2) The amount for which an employer is liable under paragraph (1) shall be reduced by —

(A) any wages paid by the employer to the employee for the period of the violation;

(B) any voluntary and unconditional payment by the employer to the employee that is not required by any legal obligations.

(C) any payment by the employer to a third party or trustee (such as premiums for health benefits or payments to a defined contribution pension plan) on behalf of and attributable to the employee for the period of the violation.

In addition, any liability incurred under paragraph (1) with respect to a defined benefit pension plan may be reduced by crediting the employee with service for all purposes under such a plan for the period of the violation.

(3) Any employer who violates the provisions of section 3 with respect to a unit of local government shall be subject to a civil penalty of not more than $500 for each day of such violation, except that such penalty shall not apply if the employer pays to each aggrieved employee the amount

for which the employer is liable to that employee within 3 weeks from the date the employer orders the shutdown or layoff.

(4) If an employer which has violated this Act proves to the satisfaction of the court that the act or omission that violated this Act was in good faith and that the employer had reasonable grounds for believing that the act or omission was not a violation of this Act the court may, in its discretion, reduce the amount of the liability or penalty provided for in this section.

(5) A person seeking to enforce such liability, including a representative of employees or a unit of local government aggrieved under paragraph (1) or (3), may sue either for such person or for other persons similarly situated, or both, in any district court of the United States for any district in which the violation is alleged to have occurred, or in which the employer transacts business.

(6) In any such suit, the court, in its discretion, may allow the prevailing party a reasonable attorney's fee as part of the costs.

(7) For purpose of this subsection, the term, "aggrieved employee" means an employee who has worked for the employer ordering the plant closing or mass layoff and who, as a result of the failure by the employer to comply with section 3 [29 U.S.C.S. § 2102], did not receive timely notice either directly or through his or her representative as required by section 3 [29 U.S.C.S. § 2102].

(b) Exclusivity of remedies. The remedies provided for in this section shall be the exclusive remedies for any violation of this Act [29 U.S.C.S. §§ 2101 *et seq.*]. Under

this Act [29 U.S.C.S. §§ 2101 *et seq.*], a Federal court shall not have authority to enjoin a plant closing or mass layoff.

§ 2105. Procedures in Addition to Other Rights of Employees

The rights and remedies provided to employees by this Act [29 U.S.C.S. §§ 2101 *et seq.*] are in addition to, and not in lieu of, any other contractual or statutory rights and remedies of the employees, and are not intended to alter or affect such rights and remedies, except that the period of notification required by this Act shall run concurrently with any period of notification required by contract or by any other statute.

§ 2106. Procedures Encouraged Where Not Required

It is the sense of Congress that an employer who is not required to comply with the notice requirements of section 3 [29 U.S.C.S. § 2102] should, to the extent possible, provide notice to its employees about a proposal to close a plant or permanently reduce its work force.

§ 2107 Authority to Prescribe Regulations

(a) The Secretary of Labor shall prescribe such regulations as may be necessary to carry out this Act [29 U.S.C.S. § 2101 *et seq.*]. Such regulation shall, at a minimum, include interpretative regulations describing the methods by which employers may provide for appropriate service of notice as required by this Act [20 U.S.C.S. §§ 2101 *et seq.*].

(b) The mailing of notice to an employee's last known address or inclusion of notice in the employee's paycheck will be considered acceptable methods for fulfillment of the

employer's obligation to give notice to each affected employee under this Act [29 U.S.C.S. §§ 2101 *et seq.*].

§ 2108. Effect on Other Lives

The giving of notice pursuant to this Act [29 U.S.C.S. §§ 2101 *et seq.*], if done in good-faith compliance with this Act [29 U.S.C.S. §§ 2101 *et seq.*] shall not constitute a violation of the National Labor Relations Act or the Railway Labor Act.

§ 2109. Report on Employment and International Competitiveness

Two years after the date of enactment of this Act [**enacted** Aug. 4, 1988] the Comptroller General shall submit to the Committee on Small Business of both the House and Senate, the Committee on Labor and Human Resources, and the Committee on Education and Labor a report containing a detailed and objective analysis of the effect of this Act [29 U.S.C.S. §§ 2101 *et seq.*] on employers (especially small- and medium-sized businesses), the economy (interna-

PART II
20 C.F.F., CHAPTER V PART 639 — WARN

Authority: 29 U.S.C. 2107(a).

Source: 54 FR 16064, Apr. 20, 1989, unless otherwise noted.

§ 639.1 Purpose and Scope

(a) *Purpose of WARN.* The Worker Adjustment and Retraining Notification Act (WARN or the Act) provides protection to workers, their families and communities by

requiring employers to provide notification 60 calendar days in advance of plant closings and mass layoffs. Advance notice provides workers and their families some transition time to adjust to the prospective loss of employment, to seek and obtain alternative jobs and, if necessary, to enter skill training or retraining that will allow these workers to successfully compete in the job market. WARN also provides for notice to State dislocated worker units so that dislocated worker assistance can be promptly provided.

(b) *Scope of these regulations.* These regulations establish basic definitions and rules for giving notice, implementing the provisions of WARN. The Department's objective is to establish clear principles and broad guidelines which can be applied in specific circumstances. However, the Department recognizes that Federal rule-making cannot address the multitude of industry and company-specific situations in which advance notice will be given.

(c) Notice encouraged where not required. Section 7 of the Act states:

> *It is the sense of Congress that an employer who is not required to comply with the notice requirements of section 3 should, to the extent possible, provide notice to its employees about a proposal to close a plant permanently reduce its work force.*

(d) *WARN enforcement.* Enforcement of WARN will be though the courts, as provided in section 5 of the statute. Employees, their representatives and units of local government may initiate civil actions against employers believed to be in violation of §3 of the Act. The Department of Labor has no legal standing in any enforcement action and, therefore, will not be in a position to issue advisory opinions of specific cases. The Department will provide

assistance in understanding these regulations and may revise them from time to time as may be necessary.

(e) Notice is ambiguous situations. It is civically desirable and it would appear to be good business practice for an employer to provide advance notice to its workers or unions, local government and the State when terminating a significant number of employees. In practical terms, there are some questions and ambiguities of interpretation inherent in the application of WARN to business practices in the market economy that cannot be addressed in these regulations. It is therefore prudent for employers to weigh the desirability of advance notice against the possibility of expensive and time-consuming litigation to resolve disputes where notice has not been given. The Department encourages employers to give notice in all circumstances.

(f) Coordination with job placement and retraining programs, The Department, through these regulations and through the Trade Adjustment Assistance Program (TAA) and Economic Dislocation and Worker Adjustment Assistance Act (EDWAA) regulations, encourages maximum coordination of the actions and activities of these programs to assure that the negative impact of dislocation on workers is lessened to the extent possible. By providing for notice to the State dislocated worker unit, WARN notice begins the process of assisting workers who will be dislocated.

(g) WARN not to supersede other laws and contracts. The provisions of WARN do not supersede any laws or collective bargaining agreements that provide for additional notice or additional rights and remedies. If such law or agreement provides for a longer notice period, WARN notice shall run concurrently with that additional notice period. Collective bargaining agreements may be used to clarify or amplify the terms and conditions of WARN, but may not reduce WARN rights.

§ 639.2 What Does WARN Require?

WARN requires employers who are planning a plant closing or a mass layoff to give affected employees at least 60 days' notice of such an employment action. While the 60-day period is the minimum for advance notice, this provision is not intended to discourage employees from voluntarily providing longer periods of advance notice. Not all plant closings and layoffs are subject to the Act, and certain employment thresholds must be reached before the Act applies. WARN sets out specific exemptions, and provides for a reduction in the notification period in particular circumstances. Damages and civil penalties can be assessed against employers who violate the Act.

§ 639.3 Definitions

(a) *Employer.* (1) term "employer" means any business enterprise that employs —

(i) 100 or more employees, excluding part-time employees; or

(ii) 100 or more employees, including part-time employees, who in the aggregate work at least 4,000 hours per week, exclusive of hours of overtime.

Workers on temporary layoff or on leave, who have a reasonable expectation of recall are counted as employees. An employee has a "reasonable expectation of recall" when he/she understands, through notification or through industry practice, that his/her employment with the employer has been temporarily interrupted and that he/she will be recalled to the same or to a similar job. The term "employer" includes nonprofit organizations of the requisite size. Regular Federal State, local, and federally recognized Indain tribal

governments are not covered. However, the term "employer" includes public and quasi-public entities which engage in business (*i.e.*, take part in a commercial or industrial enterprise, supply a service or good on a mercantile basis, or provide independent management of public assets, raising revenue and making desired investments), and which are separately organized from the regular government, which have their own governing bodies and which have authority to manage their personnel and assets.

(2) Under existing legal rules, independent contractors and subsidiaries which are wholly or partially owned by a parent company are treated as separate employers or as a part of the parent or contracting company depending upon the degree of their independence from the parent. Some of the factors to be considered in making this determination are (i) common ownership, (ii) common directors and/or officers, (iii) *de facto* exercise of control, (iv) unity of personnel policies emanating from a common source, and (v) the dependency of operations.

(3) Workers, other than part-time workers, who are exempt from notice under section 4 of WARN are nonetheless counted as employees for purpose of determining coverage as an employer.

(4) An employer may have one or more sites of employment under common ownership or control. An example would be a major auto maker which has dozens of automobile plants throughout the country. Each plant would be considered a site of employment, but there is only one "employer", the auto maker.

(b) *Plant closing*. The term "plant closing: means the permanent or temporary shutdown of a "single site of

employment," or one or more "facilities or operating units" within a single site of employment, if the shutdown results in an "employment loss" during any thirty-day period at the single site of employment for fifty or more employees, excluding any part-time employees. An employment action that results in the effective cessation of production or the work performed by a unit, even if a few employees remain, is a shutdown. A "temporary shutdown" triggers the notice requirement only if there are a sufficient number of terminations, layoffs exceeding six months, or reduction in hours of work as specified under the definition of "employment loss."

(c) Mass layoff. (1) The term "mass layoff" means a reduction in force which first, is not the result of a plant closing, and second, results in an employment loss at the single site of employment during any thirty-day period for:

(i) at least 33 percent of the active employees, excluding part-time employees; and

(ii) at least 50 employees, excluding part-time employees.

Where 500 or more employees (excluding part-time employees) are affected, the 33 percent requirement does not apply, and notice is required if the other criteria are met. Plant closings involve employment loss which results from the shutdown of one or more distinct units within a single site or the entire site. A mass layoff involves employment loss, regardless of whether one or more units are shut down at the site.

(2) Workers, other than part-time workers who are exempt from notice under section 4 of WARN, are nonetheless counted as employees for purposes of

determining coverage as a plant closing or mass layoff. For example, if an employer closes a temporary project on which 10 permanent and 40 temporary workers are employed, a covered plant closing has occurred although only 10 workers are entitled to notice.

(d) *Representative.* The term "representative" means an exclusive representative of employees within the meaning of section 9(a) or 8(f) of the National Labor Relations Act or section 2 of the Railway Labor Act.

(e) *Affected employees.* The term "affected employees" means employees who may reasonably be expected to experience an employment loss as a consequence of a proposed plant closing or mass layoff by their employer. This includes individually identifiable employees who will likely lose their jobs because of bumping rights or other factors, to the extent that such individual workers reasonably can be identified at the time notice is required to be given. The term "affected employees" includes managerial and supervisory employees, but does not include business partners. Consultant or contract employees who have a separate employment relationship with another employer and are paid by that other employer, or who are self-employed, are not "affected employees" of the business to which they are assigned. In addition, for purposes of determining whether coverage thresholds are met, either incumbent workers in jobs being eliminated or, if known 60 days in advance, the actual employees who suffer an employment loss may be counted.

(f) Employment loss. (1) The term "employment loss" means (i) an employment termination, other than a discharge for cause, voluntary departure, or retirement, (ii) a layoff exceeding 6 months, or (iii) a reduction in hours of work of individual employees or more than 50 percent during each month of any 6-month period.

(2) Where a termination or a layoff)*see* paragraphs (f)(1)(i) and (ii) of this section) is involved, an employment loss does not occur when an employee is reassigned or transferred to employer-sponsored programs, such as retraining or job search activities, as long as the reassignment does not constitute a constructive discharge or other involuntary termination.

(3) An employee is not considered to have experienced an employment loss if the closing or layoff is the result of the relocation or consolidation of part or all of the employer's business and, prior to the closing or layoff —

(i) the employer offers to transfer the employee to a different site of employment within a reasonable commuting distance with no more than a 6-month break in employment; or

(ii) the employer offers to transfer the employee to any other site of employment regardless of distance with no more than an 8-month break in employment, and the employee accepts within 30 days of the offer or of the closing or layoff, whichever is later.

(4) A "relocation or consolidation" of part or all of an employer's business, for purposes of paragraph § 639.3(h)(4), means that some definable business, whether customer orders, product lines, or operations, is transferred to a different site of employment and that transfer results in a plant closing or mass layoff.

(g) Unit of local government. The term "unit of local government" means any general purpose political subdivision of a State which has the power to levy taxes and spend funds and which also has general corporate and police powers. When a covered employment site is located in more

than one unit of local government, the employer must give notice to the unit to which it determines it directly paid the highest taxes for the year preceding the year for which the determination is made. All local taxes directly paid to the local government should be aggregated for this purpose.

(h) Part-time employees. The term "part-time" employee means an employee who is employed for an average of fewer than 20 hours per week or who has been employed for fewer than 8 of the 12 months preceding the date on which notice is required, including workers who work full-time. This term may include workers who would traditionally be understood as "seasonal" employees. The period to be used for calculating whether a worker has worked "an average of fewer than 20 hours per week" is the shorter of the actual time the worker has been employed or the most recent 90 days.

(i) Single site of employment. (1) A single site of employment can refer to either a single location or a group of contiguous locations. Groups of structures which form a campus or industrial park, or separate facilities across the street from one another, may be considered a single site of employment.

(2) There may be several single sites of employment within a single building, such as an office building, if separate employers conduct activities within such a building. For example, an office building housing 50 different businesses will contain 50 single sites of employment. The offices of each employer will be its single site of employment.

(3) Separate buildings or areas which are not directly connected or in immediate proximity may be considered a single site of employment if they are in reasonable

geographic proximity, used for the same purpose, and share the same staff and equipment. An example is an employer who manages a number of warehouses in an area but who regularly shifts or rotates the same employees from one building to another.

(4) Noncontiguous sites in the same geographic area which do not share the same staff or operational purpose should not be considered a single site. For example, assembly plants which are located on opposite sides of a town and which are managed by a single employer are separate sites if they employ different workers.

(5) Contiguous buildings owned by the same employer which have separate management, produce different products, and have separate work forces are considered separate single sites of employment.

(6) For workers whose primary duties require travel from point to point, who are outstationed, or whose primary duties involve work outside any of the employer's regular employment sites (*e.g.*, railroad workers, bus drivers, salespersons), the single site of employment to which they are assigned as their home base, from which their work is assigned, or to which they report will be the single site in which they are covered for WARN purposes.

(7) Foreign sites of employment are not covered under WARN. U.S. workers at such sites are counted to determine whether an employer is covered as an employer under § 639.3(a).

(8) The term "single site of employment" may also apply to truly unusual organizational situations where the above criteria do not reasonable apply. The application of this definition with the intent to evade the purpose of the Act to provide notice is not acceptable.

(j) Facility or operating unit. The term "facility" refers to a building or buildings. The term "operating unit" refers to an organizationally or operationally distinct product, operation, or specific work function within or across facilities at the single site.

(k) State dislocated worker unit. The term "State dislocated worker unit" means a unit designated or created in each State by the Governor under Title III of the Job Training Partnership Act, as amended by EDWAA.

(l) State. For the purpose of WARN, the term "State" includes the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, and the U.S. Virgin Islands.

§ 639.4 Who Must Give Notice?

Section 3(a) of WARN states that "an employer shall not order a plant closing or mass layoff until the end of a 60-day period after the employer serves written notice of such an order...." Therefore, an employer who is anticipating carrying out a plant closing or mass layoff is required to give notice to affected employees or their representative(s), the State dislocated worker unit and the chief elected official of a unit of local government.

(a) It is the responsibility of the employer to decide the most appropriate person within the employer's organization to prepare and deliver the notice to affected employees or their representative(s), the State dislocated worker unit and the chief elected official of a unit of local government. In most instances, this may be the local site plant manager, the local personnel director or a labor relations officer.

(b) An employer who has previously announced and carried out a short term layoff (6 months of less) which is being extended beyond 6 months due to business circumstances (including unforeseeable changes in price or cost) not reasonably foreseeable at the time of the initial layoff is require to give notice when it becomes reasonably foreseeable that the extension is required. A layoff extending beyond 6 months from the date the layoff commenced for any other reason shall be treated as an employment loss from the date of its commencement.

(c) In the case of the sale of part or all of a business, section 2(b)(1) of WARN defines who the "employer" is. The seller is responsible for providing notice of any plant closing or mass layoff which takes place up to and including the effective date (time) of the sale, and the buyer is responsible for providing notice of any plant closing or mass layoff that takes place thereafter. Affected employees are always entitled to notice; at all times the employer is responsible for providing notice.

(1) If the seller is made aware of any definite plans on the part of the buyer to carry out a plant closing or mass layoff within 60 days of purchase, the seller may give notice to affected employees as an agent of the buyer, if so empowered. If the seller does not give notice, the buyer is, nevertheless, responsible to give notice. If the seller gives notice as the buyer's agent, the responsibility for notice still remains with the buyer.

(2) It may be prudent for the buyer and the seller to determine the impacts of the sale on workers, and to arrange between them for advance notice to be given to affected employees or their representative(s), if a mass layoff or plant closing is planned.

§ 639.5 When Must Notice Be Given?

(a) General rule. (1) With certain exceptions discussed in paragraphs (b),(c), and (d) of this section and in § 639.9 of this part, notice must be given at least 60 calendar days prior to any planned plant closing or mass layoff, as defined in these regulations. When all employees are not terminated on the same date, the date of the first individual termination within the statutory 30-day or 90-day period triggers the 60-day notice requirement. A worker's last day of employment is considered the date of that worker's layoff. The first and each subsequent group of terminees are entitled to a full 60 days' notice. In order for an employer to decide whether issuing notice is required, the employer should —

(i) Look ahead 30 days and behind 30 days to determine whether employment actions both taken and planned will, in the aggregate for any 30-day period, reach the minimum numbers for a plant closing or a mass layoff and thus trigger the notice requirement; and

(ii) Look ahead 90 days and behind 90 days to determine whether employment actions both taken and planned each of which separately is not of sufficient size to trigger WARN coverage will, in the aggregate for any 90-day period, reach the minimum numbers for a plant closing or a mass layoff and thus trigger the notice requirement. An employer is not, however, required under section 3(d) to give notice if the employer demonstrates that the separate employment losses are the result of separate and distinct actions and causes, and are not an attempt to evade the requirements of WARN.

(2) The point in time at which the number of employees is to be measured for the purpose of determining coverage is the date the first notice is required to be given. If this "snapshot" of the number of employees employed on that date is clearly unrepresentative of the ordinary or average employment level, then a more representative number can be used to determine coverage. Examples of unrepresentative employment levels include cases when the level is near the peak or trough of an employment cycle or when large upward or downward shifts in the number of employees occur around the time notice is to be given. A more representative number may be an average number of employees over a recent period of time or the number of employees on an alternative date which is more representative of normal employment levels. Alternative methods cannot be used to evade the purpose of WARN, and should only be used in unusual circumstances.

(b) Transfers. (1) Notice is not required in certain cases involving transfers, as described under the definition of "employment loss" at § 639.3(f) of this part.

(2) An offer of reassignment to a different site of employment should not be deemed to be a "transfer" if the new job constitutes a constructive discharge.

(3) The meaning of the term "reasonable commuting distance" will vary with local and industry conditions. In determining what is a "reasonable commuting distance," consideration should be given to the following factors: geographic accessibility of the place of work, the quality of the roads, customarily available transportation, and the usual travel time.

(4) In cases where the transfer is beyond reasonable commuting distance, the employer may become liable for

failure to give notice if an offer to transfer is not accepted within 30 days of the offer or of the closing or layoff (whichever is later). Depending upon when the offer of transfer was made by the employer, the normal 60-day notice period amy have expired and the plant closing or mass layoff may have occurred. An employer is, therefore, well advised to provide 60-day advance notice as part of the transfer offer.

(c) Temporary employment. (1) No notice is required if the closing is of a temporary facility, or if the closing or layoff is the result of the completion of a particular project or undertaking, and the affected employees were hired with the understanding that their employment was limited to the duration of the faility or the project or undertaking.

(2) Employees must clearly understand at the time of hire that their employment is temporary. When such understanding exist will be determined by reference to employment contracts, collective bargaining agreements, or employment contracts, collective bargaining agreements, or employment practices of an industry or a locality, but the burden of proof will lie with the employer to show that the temporary nature of the project or facility was clearly communicated should questions arise regarding the temporary employment understandings.

(3) Employers in agriculture and construction frequently hire workers for harvesting, processing, or for work on a particular building or project. Such work may be seasonal but recurring. Such work falls under this exemption if the workers understood at the time they were hired that their work was temporary. In uncertain situations, it may be prudent for employers to clarify temporary work understandings in writing when workers are hired. The same employers may also have permanent employees who work on

a variety of jobs and tasks continuously through most of the calendar year. Such employees are not included under this exemption. Giving written notice that a project is temporary will not convert permanent employment into temporary work, making jobs exempt from WARN.

(4) Certain jobs may be related to a specific contract or order. Whether such jobs are temporary depends on whether the contract or order is part of a one-term relationship. For example, an aircraft manufacturer hires workers to produce a standard airplane for the U.S. fleet under a contract with the U.S. Air Force with the expectation that its contract will continue to be renewed during the foreseeable future. The employees of this manufacturer would not be considered temporary.

(d) Strikes or lockouts. The statute provides an exemption for strikes and lockouts which are not intended to evade the requirement of the Act. A lockout occurs when, for tactical or defensive reasons during the course of collective bargaining or during a labor dispute, an employer lawfully refuses to utilize some or all of its employees for the performance of available work. A lockout not related to collective bargaining which is intended as a subterfuge to evade the Act does not qualify for this exemption. A plant closing or mass layoff at a site of employment where a strike or lockout is taking place, which occurs for reasons unrelated to a strike or lockout, is not covered by this exemption. an employer need not give notice when permanently replacing a person who is deemed to be an economic striker under the National Labor Relations Act. Nonstriking employees at the same single site of employment who experience a covered employment loss as a result of a strike are entitled to notice, however, situations in which a strike or lockout affects nonstriking employees at the same plant may constitute an unforeseeable business circumstance, as discussed in § 639.9,

and reduced notice may apply. Similarly, the "faltering company" exception also discussed in § 639.9 may apply in strike situations. Where a union which is on strike represents more than one bargaining unit at the single site, nonstrikers includes the nonstriking bargaining unit(s). Notice also is due to those workers who are not a part of the bargaining unit(s) which is involved in the labor negotiations that led to the lockout. Employees at other plants which have not been struck, but at which covered plant closings or mass layoffs occur as a direct or indirect result of a strike or lockout are not covered by the strike/lockout exemption. The unforeseeable business circumstances exception to 60 days' notice also may apply to these closings or layoffs at other plants.

§ 639.6 Who Must Receive Notice?

Section 3(a) of WARN provides for notice to each representative of the affected employees as of the time notice is required to be given or if there is no such representative at that time, to each affected employee. Notice also must be served on the State dislocated worker unit and the chief elected official of the unit of local government within which a closing or layoff is to occur. Section 2(b)(1) of the Act states that "any person who is an employee of the seller (other than a part-time employee) as of the effective date [time] of the sale shall be considered an employee of the purchaser immediately after the effective date [time] of the sale." This provision preserves the notice rights of the employees of a business that has been sold, but creates no other employment rights. Although a technical termination of the seller's employees may be deemed to have occurred when a sale becomes effective, WARN notice is only required where the employees, in fact, experience a covered employment loss.

(a) Representative(s) of affected employees. Written notice is to be served upon the chief elected officer of the exclusive representative(s) or bargaining agent(s) of affected employees at the time of the notice. If this person is not the same as the officer of the local union(s) representing affected employees, it is recommended that a copy also be given to the local union official(s).

(b) Affected employees. Notice is required to be given to employees who may reasonably be expected to experience an employment loss. This includes employees who will likely lose their jobs because of bumping rights or other factors, to the extent that such workers can be identified at the time notice is required to be given. If at the time notice is required to be given, the employer cannot identify the employee who may reasonably be expected to experience an employment loss due to the elimination of a particular position, the employer must provide notice to the incumbent in that position. While part-time employees are not counted in determining whether plant closing or mass layoff thresholds are reached, such workers are due notice.

(c) State dislocated worker unit. Notice is to be served upon the State dislocated worker unit. Since the States are restructuring to implement training under EDWAA, service of notice upon the State Governor constitutes service upon the State dislocated worker unit until such time as the Governor makes public State procedures for serving notice to this unit.

(d) Chief elected official of the unit of local government. The identity of the chief elected official will vary according to the local government structure. In the case of elected boards, the notice is to be served upon the board's chairperson.

§ 639.7 What Must the Notice Contain?

(a) Notice must be specific. (1) All notice must be specific.

(2) Where voluntary notice has been given more than 60 days in advance, but does not contain all of the required elements set out in this section, the employer must ensure that all of the information required by this section is provided in writing to the parties listed in § 639.6 at least 60 days in advance of a covered employment action.

(3) Notice may be given conditionally upon the occurrence or nonoccurrence of an event, such as the renewal of a major contract, only when the event is definite and the consequences of its occurrence or nonoccurrence will necessarily, in the normal course of business, lead to a covered plant closing or mass layoff less than 60 days after the event. For example, if the nonrenewal of a major contract will lead to the closing of the plant that produces the articles supplied under the contract 30 days after the contract expires, the employer may give notice at least 60 days in advance of the projected closing date which states that if the contract is not renewed, the plant closing will occur on the projected date. The notice must contain each of the elements set out in this section.

(4) The information provided in the notice shall be based on the best information available to the employer at the time the notice is served. It is not the intent of the regulations, that errors in the information provided in a notice that occur because events subsequently change or that are minor, inadvertent errors are to be the basis for finding a violation of WARN.

(b) As used in this section, the term "date" refers to a specific date or to a 14-day period during which a separation or separations are expected to occur. If

separations are planned according to a schedule, the schedule should indicate the specific dates on which or the beginning date of each 14-day period during which any separations are expected to occur. Where a 14-day period is used, notice must be given at least 60 days in advance of the first day of the period.

(c) Notice to each representative of affected employees is to contain:

(1) The name and address of the employment site where the plant closing or mass layoff will occur, and the name and telephone number of a company official to contact for further information'

(2) a statement as to whether the planned action is expected to be permanent or temporary and, if the entire plant is to be closed, a statement to that effect;

(3) the expected date of the first separation and the anticipated schedule for making separations;

(4) the job titles of positions to be affected and the names of the workers currently holding affected jobs.

The notice may include additional information useful to the employees such as information on available dislocated worker assistance, and, if the planned action is expected to be temporary, the estimated duration, if known.

(d) Notice to each affected employee who does not have a representative is to be written in language understandable to the employees and is to contain:

(1) a statement as to whether the planned action is expected to be permanent or temporary and, if the entire plant is to be closed, a statement to that effect;

(2) the expected date when the plant closing or mass layoff will commence and the expected date when the individual employment will be separated;

(3) an indication whether or not bumping rights exist;

(4) the name and telephone number of a company official to contact for further information.

The notice may include additional information useful to the employees such as information on available dislocated worker assistance, and, if the planned action is expected to be temporary, the estimated duration, if known.

(e) The notices separately provided to the State dislocated worker unit and to the chief elected official of the unit of local government are to contain:

(1) the name and address of the employment site where the plant closing or mass layoff will occur, and the name and telephone number of a company official to contact for further information;

(2) a statement as to whether the planned action is expected to be permanent or temporary and, if the entire plant is to be closed, a statement to that effect;

(3) the expected date of the first separation, and the anticipated schedule for making separations;

(4) the job titles of positions to be affected, and the number of affected employees in each job classification;

(5) an indication as to whether or not bumping rights exists;

(6) the name of each union representing affected employees, and the name and address of the chief elected officer of each union.

The notice may include additional information useful to the employees such as a statement of whether the planned action is expected to be temporary and, if so, its expected duration.

(f) As an alternative to the notices outlined in paragraph (e) above, an employer may give notice to the State dislocated worker unit and to the unit of local government by providing them with a written notice stating the name and address of the employment site where the plant closing or mass layoff will occur; the name and telephone number of a company official to contact for further information; the expected date of the first separation; and the number of affected employees. The employer is required to maintain the other information listed in § 639.7(e) on site and readily accessible to the state dislocated worker unit and to the unit of general local government. Should this information not be available when requested, it will be deemed a failure to give required notice.

§ 639.8 How Is the Notice Served?

Any reasonable method of delivery to the parties listed under § 639.6 of this part which is designed to ensure receipt of notice at least 60 days before separation is acceptable (*e.g.*, first class mail, personal delivery with

optional signed receipt). In the case of notification directly to affected employees, insertion of notice into pay envelopes is another viable option. A ticketed notice, *i.e.*, preprinted notice regularly included in each employee's paycheck or pay envelope, does not meet the requirements of WARN.

§ 639.9 When May Notice Be Given Less Than 60 Days in Advance:

Section 3(b) of WARN set forth three conditions under which the notification period may be reduced to less than 60 days. The employer bears the burden of proof that conditions for the exceptions have been met. If one of the exceptions have been met. If one of the exceptions is applicable, the employer must give as much notice as is practicable to the union, nonrepresented employees, the State dislocated worker unit, and the unit of local government and this may, in some circumstances, be notice after the fact. The employer must, at the time notice actually is given, provide a brief statement of the reason for reducing the notice period, in addition to the other elements set out in § 639.7.

(a) The exception under section 3(b)(1) of WARN, termed "faltering company," applies to plant closings but not to mass layoffs and should be narrowly construed. To qualify for reduced notice under this exception.

(1) An employer must have been actively seeking capital or business at the time that 60-day notice would have been required. That is, the employer must have been seeking financing or refinancing through the arrangement of loans, the issuance of stocks, bonds, or other methods of internally generated financing; or the employer must have been seeking additional money, credit, or business through any other commercially reasonable method. The employer must be

able to identify specific actions taken to obtain capital or business.

(2) There must have been a realistic opportunity to obtain the financing or business sought.

(3) The financing or business sought must have been sufficient, if obtained, to have enabled the employer to avoid or postpone the shutdown. The employer must be able to objectively demonstrate that the amount of capital or the volume of new business sought would have enabled the employer to keep the facility, operating unit, or site open for a reasonable period of time.

(4) The employer reasonably and in good faith must have believed that giving the required notice would have precluded the employer from obtaining the needed capital or business. The employer must be able to objectively demonstrate that it reasonably thought that a potential customer or source of financing would have been unwilling to provide the new business or capital if notice were given, that is, if the employees, customers, or the public were aware that the facility, operating unit, or site might have to close. This condition may be satisfied if the employer can show that the financing or business source would not choose to do business with a troubled company or with a company whose work force would be looking for other jobs. The actions of an employer relying on the "faltering company" exception will be viewed in a company-wide context. Thus, a company with access to capital markets or with cash reserves may not avail itself of this exception by looking solely at the financial condition of the facility, operating unit, or site to be closed.

(b) The "unforeseeable business circumstances" exception under section 3(b)(2)(A) of WARN applies to plant

closings and mass layoffs caused by business circumstances that were not reasonably foreseeable at the time that 60-day notice would have been required.

(1) An important indicator of a business circumstance that is not reasonably foreseeable is that the circumstance is caused by some sudden, dramatic, and unexpected action or condition outside the employer's control. A principal client's sudden and unexpected termination of a major contract with the employer, a strike at a major supplier of the employer, and an unanticipated and dramatic major economic downturn might each be considered a business circumstance that is not reasonably foreseeable. A government ordered closing of an employment site that occurs without prior notice also may be an unforeseeable business circumstance.

(2) The test for determining when business circumstances are not reasonably foreseeable focuses on an employer's business judgment. The employer must exercise such commercially reasonable business judgment as would a similarity situated employer in predicting the demands of its particular market. The employer is not required, however, to accurately predict general economic conditions that also may affect demand for its products or services.

(c) The "natural disaster" exception in section 3(b)(2)(B) of WARN applies to plant closings and mass layoffs due to any form of a natural disaster.

(1) Floods, earthquakes, droughts, storms, tidal waves or tsunamis and similar effects of nature are natural disasters under this provision.

(2) To qualify for this exception, an employer must be able to demonstrate that its plant closing or mass layoff is a direct result of a natural disaster.

(3) While a disaster may preclude full or any advance notice, such notice as is practicable, containing as much of the information required in § 639.7 as is available in the circumstances of the disaster still must be given, whether in advance or after the fact of an employment loss caused by a natural disaster.

(4) Where a plant closing or mass layoff occurs as an indirect result of a natural disaster, the exception does not apply but the "unforeseeable business circumstance" exception described in paragraph (b) of this section may be applicable.

§ 639.30 When May Notice Be Extended?

Additional notice is required when the date or schedule of dates of a planned plant closing or mass layoff is extended beyond the date or the ending date of any 14-day period announced in the original notice as follows:

(a) If the postponement is for less than 60 days, the additional notice should be given as soon as possible to the parties identified in § 639.6 and should include reference to the earlier notice, the date (or 14-day period) to which the planned action is postponed, and the reasons for the postponement. The notice should be given in a manner which will provide the information to all affected employees.

(b) If the postponement is for 60 days or more, the additional notice should be treated as new notice subject to the provisions of §§ 639.5, 639.6, and 639.7 of this part. Rolling notice, in the sense of routine periodic notice, given whether or not a plant closing or mass layoff is impending, and with intent to evade the purpose of the Act rather than give specific notice as required by WARN, is not acceptable.